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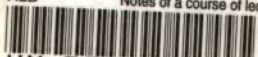
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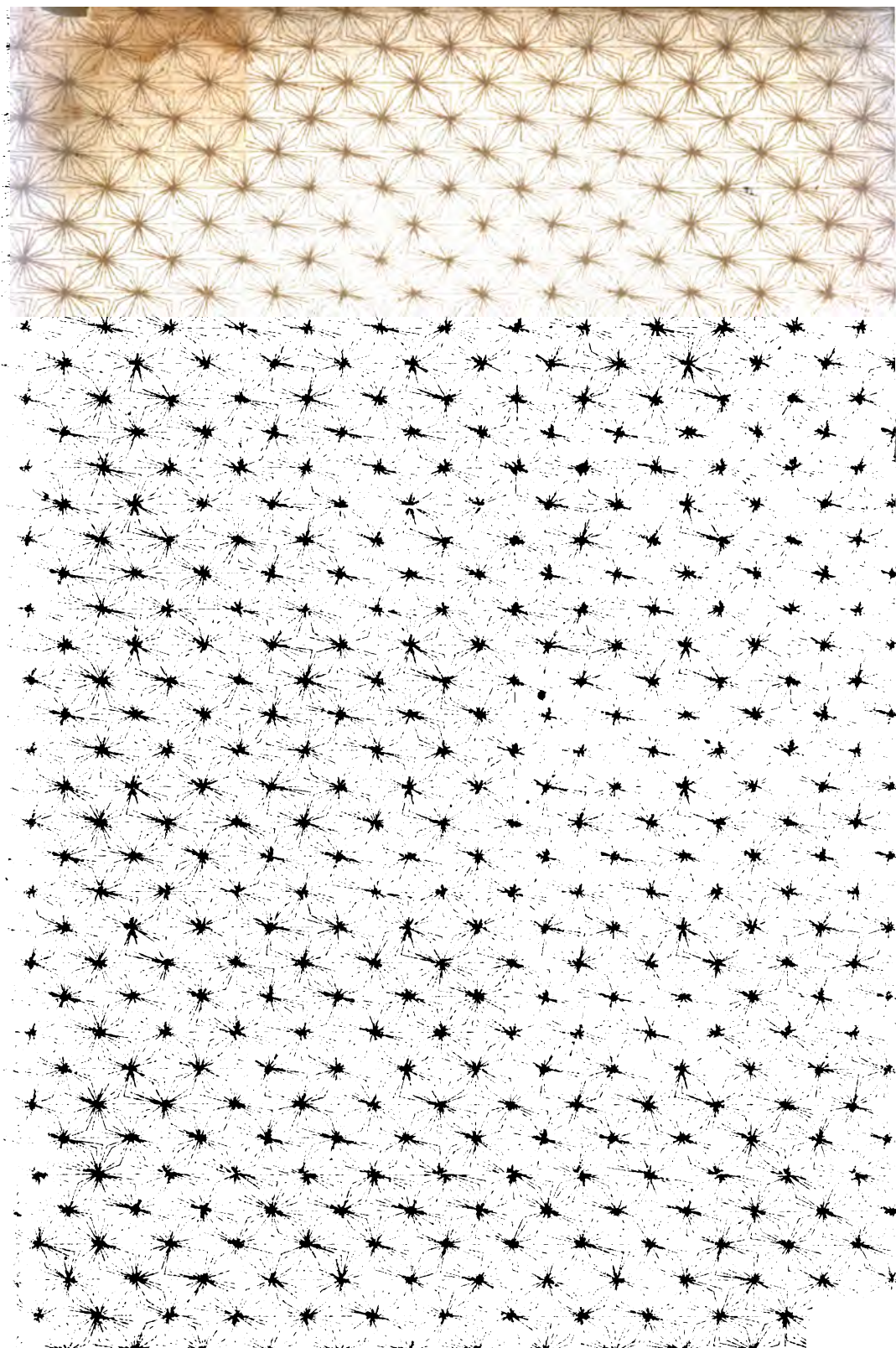


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NOTES

OF A

COURSE OF LECTURES

ON

Emmerich de
Vattel's Law of Nations
Le droit des gens.

BY

JAMES H. GILMORE,

PROFESSOR OF

CONSTITUTIONAL AND INTERNATIONAL LAW, EVIDENCE, EQUITY, AND MER-
CANTILE LAW, IN THE UNIVERSITY OF VIRGINIA.

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VATTEL.

PRELIMINARIES.

PAGE LIV.—There have been various definitions of the law of nations, but the one which seems to conform more strictly to the modern view of it may be found in Hall, p. 1:

“International law consists in certain rules of conduct which modern civilized States regard as being binding on them in their relations with one another with a force comparable in nature and degree, to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement.” For definitions by others refer to Wheaton's Inter. Law, sec. 14. Woolsey Int. Law, sec. 5. Kent's Comm. Val. p. 1.

PAGE LVI—Sec. 5.—This law of nature spoken of here has been defined to be “The rule of human action prescribed by the Creator and discoverable by the light of reason.”

PAGE LVIII—Sec. 9.—This necessary law, spoken of here, consists of the maxims which have reference, particularly, to man individually, or to him in the aggregate as forming distinct political societies. It may be compared to the moral law as regards individual man, and we might, therefore, term it the moral law of nations. And so when we test a convention or treaty by this law it may be unlawful, but not in the sense

of a wrong against the law between nations. It bears the same relation to the voluntary law of nations as the moral law does to the municipal law.

PAGE LXIII—Sec. 21—In this respect Vattel differs from his master Christian von Wolf. He deduced this voluntary law from the fiction of a great republic instituted by nature herself, and of which all the nations of the world are members. According to him the voluntary law of nations, is, as it were, the civil law of that great republic. Vattel puts it upon a different foundation, to-wit: upon the presumed consent of the different nations which are free, independent and equal: and, hence, agrees with Grotius.

PAGE LXVI—Sec. 26.—Mr. Wheaton arranges these different classes in another way. He makes the voluntary the genus, instead of the positive. The arrangements are as follows:

<i>Vattel.</i>	<i>Wheaton.</i>
1 Necessary	1 Necessary
2 Positive	2 Voluntary
<i>a</i> Voluntary	<i>a</i> Conventional
<i>b</i> Arbitrary	<i>b</i> Customary
<i>b</i> ¹ Conventional	
<i>b</i> ² Customary	

In this division of Wheaton we are relieved of drawing the nice distinction between a law founded upon the *presumed* consent of nations and one founded upon the *tacit* consent.

The difference between the voluntary and customary is, that the former only has reference to those rules which are deduced from the principle that nations are free, independent and equal, whilst the customary law includes all the customs and usages which nations are supposed to have adopted on any and all

subjects, or, as Vattel elsewhere expresses it, "the voluntary law of nations consists in rules of conduct and external right in which nations are by the law of nature bound to consent, so that we are authorized to presume their consent without seeking for a record of it in the annals of the world, because, even if they had not given it, the law of nature supplies their omission and gives it for them."

BOOK ONE.

BOOK ONE.

PAGE 1—Sec. 1.—Hall defines a State to be “a community permanently established for a political end, possessing a defined territory and independent of external control.” Hall’s Int. Law, p. 18. For various definitions see *Texas vs. White*, 7 Wall. 720. In that case the view taken is that, in this country, by a State we mean the people in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government, or united by looser and less definite relations.

Sec. 2.—It may be well to note here that this term is sometimes used to denote the State, or body politic, considered independently of the political organization, existing at any given time—a notion essentially different from that of supreme political government here spoken of. In the sense used in this section it is used throughout this work and it must not be confounded with the other use of it.

PAGE 2—Sec. 4.—In a late work by Mr. Montague Bernard is a definition of sovereignty which is approved by Sir Henry Maine. By a sovereign State, says Mr. Bernard, we mean a community of persons permanently organized under a sovereign government of their own, and by a sovereign government we mean a government, however constituted, which exercises the power of making and enforcing law within a community,

and is not itself subject to any superior government. These two factors, the one positive, the other negative, the exercise of power and the absence of superior control, compose the notion of sovereignty and are essential to it. We would prefer this definition, which is a slight modification of it only—a sovereign government is one which exercises the power of making and enforcing laws with regard to its own people exclusively, and is not itself subject, in this respect, to any superior government. Such a State would not, however, be sovereign in the sense in which it is used in the law of nations. Maine's Inter. Law, p. 54. See also Austin's Juris., vol. 1, p. 226. Lieber's C. Gov'm't, p. 156.

PAGE 3—Sec. 6.—A tribute is a stated payment made by one State to another, to secure the protection or friendship of the latter, a sum paid in acknowledgment of dependence or subjection.

Sec. 9.—Since 1857 the King of Prussia has resigned all claim over this canton of Neufchatel but he is entitled to be called the Prince of Neufchatel. This country is now a republic and part of the Swiss Confederation.

Sec. 10.—The provinces mentioned here are now in Belgium and Holland, part in each.

PAGE 7—Sec. 24.—The other "nation" alluded to here as "illustrious by its bravery and its victories," is Poland. It was once one of the most extensive and powerful kingdoms of Europe. In the fifteenth and sixteenth centuries its area is said to have exceeded 390,000 square miles, or more than that of France and Spain together. Its Legislative power was exercised by a Diet, composed of the King, the senate, the bishops and the deputies of the nobility, or gentry. Unanimity

was necessary for the passage of any bill by this Diet. It existed to the year 1772 when a first partition was made: a second was made in 1793, and the final one was made in 1795, when it disappeared as one of the nations of Europe.

PAGE 20—Sec. 52.—This plan, mentioned here, of the settlement of disputes may either be adopted where one nation proposes its mediation for the settlement of the intestine dissensions of another State, or it may be the result of positive compact. As an instance of the latter might be cited that agreement or compact, on the part of the United States, to guarantee to each State of the Federal Union a republican form of government, and by which it engages to protect each of them against invasion, and, on application of the local authorities, against domestic violence.

PAGE 36—Sec. 82.—In a country like the United States, however, experience has proven that government should not interfere in this regard, but leave these matters to private enterprise. In a republic a paternal spirit, on the part of the government, is not conducive to liberty, nor is it in accordance with its character.

PAGE 37—Sec. 88.—The foundation of the law of commerce is based upon the right which a nation has to procure, at an equitable price, whatever articles it wants, by purchasing them of other nations who have no need of them.

PAGE 40—Sec. 95.—According to Vattel prescription is the exclusion of all pretension to a right—an exclusion founded on the length of time during which that right has been neglected. And he defines usucaption to be the acquisition of domain, founded on a long possession, uninterrupted and undisputed—that is to say, an acquisition solely proved

by this possession. See page 186, Book II, chap. 11, sec. 140. We use only the word prescription to designate both of these ideas of exclusion of right and acquisition of right—and by it we designate that mode of acquisition whereby one becomes proprietor of a thing on the ground that he has for a long time possessed it as his own, or loses the right by permitting others to keep possession of it for a long time.

Sec. 94.—By treaty China has now opened five of her principal seaports to general trade. These treaties were in 1858. Great Britain has, by treaty, access to twenty-two of her seaports.

PAGE 42—Sec. 97.—A monopoly is a license or privilege granted by the Legislature for the sole buying and selling, making, working or using anything whatsoever whereby the citizen in general is restrained from such liberty, in these respects, as he had before.

The granting of such privileges is not, as a general thing, attended with beneficial results to the people. The persons, to whom the privileges have been granted, for a time, seek to make them perpetual by subsidizing the members of the Legislature. The baleful effects of these monopolies over legislation, is a crying evil of the times and one which should engage the serious attention of all who love their country. In the main, a monopoly is, really, not now granted in the United States excepts by patents to inventors and copyrights to authors.

Sec. 98.—By balance of trade we mean, the difference in money value between the imports and exports of a nation.

PAGE 43—Sec. 101.—From the foundation of the government of the United States till the year 1870 the policy of fos-

tering internal improvements by the general government, was in the main, strenuously opposed, and the only way, in which such improvements were fostered, was by slipping through Congress appropriations for them, skillfully covered up under general items. After the year 1870 the views of many of our people underwent a change and that, in favor of the right of making appropriations for the purposes of internal improvement. In December 1883 the 48th Congress established a permanent committee on Rivers and Harbors, distinct from the General Committee on Appropriations, and, now, the federal government seems to have adopted the view here presented by Vattel, although the right to do so is of doubtful constitutionality.

The work of Louis XIV, to which reference is made here, was the construction of the Languedoc Canal between the Bay of Biscay and the Mediterranean—a work which was completed in 1681. It is 148 miles in length and the summit level is 600 feet above the sea.

PAGE 44—Sec. 104.—The right of passage over the land of another, asserted here as a natural right, is not so regarded now. It is one of those imperfect rights which may be refused by the owner and of which he cannot be compelled to forego the exercise. The government has the power, under the right of eminent domain, to take enough of the land for this purpose, if the public use demands it, by paying just compensation therefor. The passage over rivers, by ferries, is, also, regulated, in this country, by State laws.

PAGE 45—Sec. 107.—By Constitution of United States, art. I, sec. viii, sub secs. 5 and 10, this power of coining is conferred on Congress and prohibited to the States. The author

Bodinus, mentioned here, is said, by Boyle, to have been one of the ablest men that appeared in France in the sixteenth century.

PAGE 46—Sec. 109.—Exchange here has reference to the practice of merchants purchasing foreign bills of exchange in order to enable them to make remittances to foreign countries without actually forwarding cash.

It is under the law stated here that Congress has the right to enact laws to punish the counterfeiting of the securities of other nations. The constitution provides for the punishment of those who counterfeit the current coin and securities of the United States. It also provides for the regulation of the value of foreign coin, and, under the provision that Congress shall have the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," it has the right to enact laws for the punishment of those who counterfeit the foreign *coin*; but there is no provision in the constitution which gives to Congress the right to punish those who counterfeit the securities of other nations. It is under this provision of the law of nations and the right to punish offences against it that Congress has this power. *United States vs. Arjona*, 120 U. S., p. 479.

PAGE 49—Sec. 114.—This freedom of discussion, regarded as so valuable here, is protected with us by the first amendment to the Constitution of the United States, which provides that Congress shall make no law abridging the freedom of speech or of the press. No attempt has been made of this character except one, and that was the passage of what is known as the sedition law in the administration of John Adams. That law was very odious to our people. It expired,

by its own limitation, before Mr. Jefferson's administration commenced, and no effort has ever since been made to pass any such law. It was the passage of this and the alien law which occasioned the famous resolutions of Virginia and Kentucky of 1798 and 1799. It is contended that Congress has, by the passage of the anti-lottery law, violated this provision by abridging the freedom of the press.

PAGE 55—Chap. xii.—This chapter, though, in many respects, it inculcates different views from those prevailing in this country in respect to this subject, and, especially, with respect to that part of it which has reference to the connection between church and state, may be profitable to us as a matter of information of what was once the view of the wise and learned upon this question, and we may be impressed, by comparison with these, with the great advance we have made on this subject. Aside from the advocacy of connection of church and state, sound and useful views, on the subject of religion, are inculcated which may be profitable to us. It is probable that, at the time of the adoption of the constitution of the United States and of the first amendments to it, the general if not the universal sentiment in this country was that Christianity ought to receive encouragement from the State, so far as such encouragement was not incompatible with the private right of conscience and the freedom of religious worship. Any attempt to level all religions and to hold all in utter indifference would have created almost universal disapprobation. And then we must remember too the views which had been expressed upon this subject by the courts. In the case of *King vs. Taylor*, 3 Keb. 607, Sir Matthew Hale had decided that Christianity was part of the common law, and

to reproach it was to speak in subversion of the laws. This was the generally received doctrine in this country. Mr. Jefferson, it is true, in his appendix to his Reports, combats this view, but it is conceded, generally, that he based his view upon a false translation of Prisot, and his view never met with any approbation. Such being the state of the law it was deemed sufficient to insert in an amendment a prohibition on Congress not to make any law establishing religion or with regard to the free exercise thereof. Mr. Justice Story, afterwards, in the Girard will case, 2 How. 198, said "that, although Christianity is a part of the common law of the State, it is only so in this qualified sense that its divine origin and truth are admitted, and, therefore, it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or to the injury of the public." These circumstances, no doubt, led to the conclusion that any other connection of church and state was not only unnecessary but would be prejudicial to the best interests of religion.

PAGE 56—Sec. 129.—The question spoken of here, as to the right of the State to interfere in the religious views and opinions of its citizens, has given rise to considerable discussion in the United States, even where Congress is prohibited from interference, in express terms, with its free exercise. This has arisen in consequence of the disturbances on this subject in the territory of Utah. This has led to the examination of what was meant by the framers of our amendment; when it is said that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The result of that examination is that this only prohibits Congress from interference in the religious *opinions* of the in-

dividual, so long as he commits no overt act in contravention of the peace and good order of society. As long, therefore, as the individual contents himself with the exercise of his opinions and the expression of them, and does not commit any overt act as aforesaid, he shall be free from interference. It is conceded that the act of religious freedom in Virginia is as broad as it can be drawn, and yet, in that, Mr. Jefferson uses this language, "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." *Reynolds vs. U. S.* 145. Code '87, secs. 1394, 1395. See also John Randolph Tucker's report from the Judiciary Committee in May, 1886. The fact that Congress can control this question whilst it is a territory, and that it cannot do this, if it is admitted as a state without some amendment of the constitution authorizing it, has so far kept this territory from admission as a state.

PAGE 59—Sec. 135.—It worthy of note here that Virginia was the first State to propose an act of *entire* religious toleration. The act of Maryland, though preceding it in point of time, was restricted to toleration to Christians. The act in Virginia was drawn by Mr. Jefferson, though some slight changes were made in it before its passage. He says, in giving account of its passage: "The bill for the establishment of religious freedom, the principles of which had, to a certain degree been enacted before, I had drawn in all the latitude of reason and right. It still met with opposition: but with some mutilations in the preamble it was finally passed: and a singular proposition proved that its protection of opinion was meant to be universal. Where the preamble declares that

coercion is a departure from the plan of the holy author of our religion, an amendment was proposed by inserting the words "Jesus Christ," so that it should read, a departure from the plan of Jesus Christ, the holy author of our religion; the insertion was rejected by a great majority, in proof that they meant to comprehend within the mantle of its protection the Jew and Gentile, the Christian and Mohammedan, the Hindoo and Infidel of every denomination." *Jefferson's Works* by T. J. Randolph, vol. 1, pp. 36, 7. Code '87, secs. 1394, 5.

PAGE 72—Sec. 152.—In this county, generally, a certain portion of property is permitted to be held by the churches free from taxation. In Virginia, by the Code '87, sections 457 and 488, all real and personal property belonging to churches are exempt from taxation and by section 1398 a valid conveyance may be made to a church of land for the use and benefit as a place for public worship or as a burial place, or a residence for a minister, or residence for a bishop, or other minister or clergyman who, though not in special charge of a congregation, is yet an officer of such church and employed under its authority and about its business, and such land is to be held for this purpose and not otherwise. They shall not hold more than two acres in a city or town nor more than seventy-five out of a city or town. sec. 1403.

PAGE 73—Sec. 152.—The question stated here, is one of the questions now agitating England; for the doctrine of disestablishment is, of course, aimed at the possessions of the church. This was a question in Virginia after the Revolution. In 1802 the Legislature of Virginia, holding that the possessions of the church belonged to the State, passed an act directing the overseers of the poor for each county, and their

successors, to sell the glebe lands of the church, as they became vacant and without an incumbent, and to apply the money, arising from such sale, to the use of the poor. Under this act a suit was brought and was decided, in the case of Turpin and als. vs. Lockett and als., 6 Call 113, in favor of the constitutionality of the act by a divided court. Judge Pendleton died the night before this decision was rendered. If he had lived the case would have been decided in favor of the church. See note at foot of case in 6 Call, p. 187. The decision of the court, however, was affirmed in the case of Seldon and als. vs. Overseers of the Poor of London, 11 Leigh 127. A contrary decision was, however, rendered in the case of Terrett vs. Taylor, 9 Craunch 43, by the Supreme Court of the United States. This court though seems to have retraced its steps in the late case of The Mormon Church vs. U. S., 136 U. S. Repts., p. 1. The facts of that case were these: On the 8th of February, 1851, the Mormon church was incorporated by the territorial Legislature of Deseret and this act was confirmed by the Legislature of Utah in 1855. In 1862 Congress repealed this act of incorporation, declared that, thereafter, no religious association should acquire a greater amount of real estate than of the value of \$50,000 and forfeited all real property owned by this church over this amount, and escheated it to the United States. On the 19th of February, 1887, by another act, Congress provided the mode in which it should be escheated and sold, and directed the Secretary of the Interior to apply the proceeds of the sale of the property to the use and benefit of the common schools of the territory of Utah. It seems that this church owned property worth \$3,000,000. Suit was brought to test the constitutionality of

these acts and, in case aforesaid, the Supreme Court sustained Congress. Ch. J. Fuller, Mr. Justice Field and Mr. Justice Lamar dissented but only for the reason of the limited power of Congress under the constitution. They do not deny this power to a different government. It may be said, therefore, that the doctrine asserted by Vattel for the State is the doctrine here.

PAGE 74—Sec. 154.—The case of Thomas á Becket would have been a stronger illustration. He wrote to one of the ecclesiastics in England who counselled moderation in his conduct: "Tell the King that the Lord of men and angels has two powers, princes and priests, the first earthly, the second spiritual: the first to obey, the second to command. He, who breaks this order, breaks the ordinance of God."

PAGE 77—Sec. 158.—Edmund Burke says that justice is itself the great standing policy of civil society and any eminent departure from it under any circumstances lies under the suspicion of being no policy at all. *Burke's Works*, vol. 3, p. 107.

PAGE 78—Sec. 163.—This practice of deciding and determining causes was carried into execution by the early kings of England and after they gave up the enforcement and trial of common law causes they still retained causes in Equity. Even now, on the theory that the sovereign decides the causes, the writs run in his or her name.

PAGE 79—Sec. 168.—This kind of justice is sought to be carried out by what is known as the Civil Service Act in the United States. By this act the President of the United States is authorized to prescribe such regulations for the admission of persons into the civil service of the United States. And

Congress has provided for the appointment of a commission and other officers to carry the principle into effect. It will be a happy day for the United States when they abandon the "spoils" system and adopt the principle of fitness for office as the test. Revised Stats. of U. S., sec. 1753.

PAGE 82—Sec. 173.—In this class of cases it will be observed that a different rule prevails to that in civil causes. In civil cases he has no right to interfere at all, but in criminal cases, whilst he cannot, directly, interfere with the trial, he can, indirectly, interfere with the verdict and judgment by the exercise of the pardoning power which, in almost every government is, in some form or other, vested in the Executive. The constitution of the United States provides that the President of the United States, shall have power to grant reprieves and pardons, except in cases of impeachment, and the 14th Amendment has made another exception with regard to those who, having held office, afterwards engaged in insurrection and rebellion. They can only be pardoned by a two-thirds vote of each house. The courts have made another exception and that is in case of contempts of either House of Congress. Const. U. S., art. ii., sec. 2, sub. sec. 1 and art. xiv. Story on Const., sec. 1503.

PAGES 84, 5 and 6—Sec. 176.—In this country the suppression of duelling is left to the several States. The following measures have been resorted to for the purpose of its suppression in Virginia.

In the constitution of Virginia, art. 3, sec. 3, it was declared that no person who while a citizen of this State has, since the adoption of the constitution, fought a duel with a deadly weapon, sent or accepted a challenge to fight a duel with a

deadly weapon either within or beyond the boundaries of this State, or knowingly conveyed a challenge or aided or assisted in any manner in fighting a duel, shall be allowed to vote or hold any office of honor, profit, or trust under this constitution. After the adoption of this section and at the January term 1877 of the Supreme Court of Appeals of Virginia, the case of *Royal vs. Thomas* was brought before it. This was a case which had been gotten up to raise the question whether this provision was self executing or needed legislation to aid in its enforcement. The court decided that the provision was self executing. Then the Legislature of Virginia was procured to submit to the people an amendment to the constitution giving the power to that body, by a two thirds vote, to remove the disabilities incurred under this provision. That amendment was adopted, as such measures usually are, by the active exertions of the friends of this practice and the apathy of those who opposed it, and now after every session may be read, in the acts, the removal of the disabilities of sundry citizens of Virginia for participation in duels. Another difficulty always presented itself in such cases—that was, to procure witnesses who, without criminating themselves, could testify. This was sought to be obviated by an act of the Legislature of Virginia in October, 1870, which provided "that no statement made" by any person engaged in the duel, "shall be used against himself on his trial." In the case of *Cullen vs. Commonwealth*, 24 Gratt. 624, the question was made whether a witness could be compelled to testify under this provision, and it was decided that he could not, as it did not provide full indemnity. To remedy this, another act was passed which provides "that any person who bears a challenge or acceptance

to fight a duel with a deadly weapon, if such duel be fought and any person be killed or wounded by such fighting, or who engages or is concerned in any manner, directly or indirectly, in a duel fought with a deadly weapon, by which fighting any person is killed or wounded, may be required in any prosecution against any person but himself for such killing or wounding to testify as a witness, as well before the grand jury as before the court, or any judicial tribunal having cognizance of the offence; and when he shall have so testified, he shall never thereafter be liable to any punishment or prosecution for any offence committed by him, as principal, accessory, or otherwise, in or about the said duel." It is believed that if this law is faithfully executed it will have a tendency to suppress this "Gothic" and barbarous practice. It is true, it has been suggested by three of our judges that in no way can the Legislature compel a party to the duel to testify, because the constitution provides that in all capital or criminal prosecutions no man can be compelled to give evidence against himself. They do not explain how a party could be said to be compelled to testify against himself when the law provides that for this offence *he* shall never be prosecuted. This same question has been raised under a similar statute and our court has decided that a party under similar circumstances *can* be compelled to testify. Code '87, secs. 24, 162, 3899. Royall vs. Thomas, 28 Gratt. 130. Kendrick vs. Commonwealth, 78 Va. 490. Cullen vs. Commonwealth, 24 Gratt. *supra*.

PAGE 98—Sec. 208.—There are several things that must be done in order to make the occupation legally effective. In the first place, the persons who take possession must have some general or specific authority from their State to do this,

or their act must, afterwards, be ratified by their State, and, in the latter case, something more than the mere act of taking possession must be done in the first instance. Occupation must then be a State act, and this act must be succeeded by further acts of ownership. This occupation when effective not only embraces the land actually occupied, but all the adjacent territory which may be needed for its security, or which may fairly be said to be attendant upon it. In the case of larger islands or the sea coast, a question arises of more difficulty; in determining what this attendant or adjacent territory must be. What must be its limits? The general rule, as to its interior limits, seems to be that it shall not extend further than the crest of the water-shed; but its lateral frontiers are still more undefined. It has been admitted that the occupation of the coast entitles the occupant to the whole of the territory drained by the rivers which empty within its lines, but, at the same time, it is held that this must bear some fair proportion to the extent of the sea coast occupation. This rule was based upon the idea that these water ways were an important means of penetrating into the interior. Now when other ways seem to be more desirable and valuable, there would seem to be no special reason for insisting upon this lateral extent of territory. The principle now is not of any practical importance, however, except as to the continent of Africa, and there the great rivers are so arranged that it would be difficult to make a satisfactory application of this rule. At the Berlin Conference of 1885 the inclination seemed to be to confine the title to such lands as were actually occupied. There would seem, however, to be justice in making the rule include so much territory, besides that actually occupied, as

would be necessary for the security of the part occupied. See Hall's Int. Law, secs. 32, 33, pp. 105—116.

At this point it may be well to call attention to a subject, in connection with the occupation of territory, which is often spoken of in this country and which is designated the Monroe doctrine. This doctrine has been discussed of late years at considerable extent in relation to the treaty, between the United States and Great Britain, known as the Clayton-Bulwer treaty. It will be well to look to the circumstances which gave rise to the declarations of Mr. Monroe, which are now dignified with the name of his doctrine. These declarations of Mr. Monroe embraced two subjects which were entirely distinct in character but as they are together spoken of as the Monroe doctrine, it will be as well to consider them together. The first declaration had reference to the occupation of territory and to the acquisition of title to territory by that occupation, or colonization. At the time of this declaration by Mr. Monroe, which was in December, 1823, the only occupants of the North American Continent were, besides the United States, Russia and Great Britain. The Czar of Russia had, by a ukase of Sept. 4, 1821, asserted exclusive territorial right from the extreme limits on the northwestern side to the 51st parallel and Great Britain and the United States had, by the treaty of 1818, agreed to a joint occupation of the northwest coast west of the Rocky Mountains that might be claimed by either, without prejudice to the right of either. This question would have to be settled some day. It was important to settle the question whether any of this country could be acquired by *others* by occupation, and this was a question important to all three of these powers, however much they

might differ between themselves as to the particular part of this territory to which each was entitled. In this posture of affairs Mr. John Quincy Adams, the Secretary of State, in a letter dated July 2, 1823, wrote to Mr. Rush, our minister at London, enclosing his letter of instructions to Mr. Middleton, our minister to Russia, and asked him to confer freely with the British government upon this question. In this letter Mr. Adams says "A necessary consequence of this state of things will be that the American continent henceforth will no longer be subject to colonization." It will be observed here that colonization has a well-defined meaning and that is, the establishment of a settlement by emigrants from the parent country, in a territory either uninhabited, or from which the inhabitants have been partially or wholly expelled. He goes on further to say: "Occupied by civilized nations they will be accessible to Europeans and each other on that footing alone; and the Pacific ocean in every part of it will remain open to the navigation of all nations in like manner with the Atlantic. Incidental to the condition of national independence and sovereignty, the rights of the interior navigation of their rivers will belong to each of the American nations within its own territory." This is the germ of that portion of the Monroe doctrine relating to non-colonization. It will be observed that it was the mere assertion of the fact that this continent was so occupied, at that time by civilized nations, as to exclude any future acquisition of title to any part of it by virtue of any subsequent occupation. Whether the state of things, at that time, justified this declaration or not is a matter of no consequence, as it will be admitted that this country is so occupied *now*, as to exclude any further acquisition of title to

it by occupancy and colonization; and so it may be said that this part of the Monroe doctrine has ceased really to exist as a point of dispute. The only question, therefore, which can be made about it now it seems must be with reference to that part which had no connection with occupation or colonization of territory at all. The result of the Congresses at Layback and Verona, in the Spring and Fall of 1821 and 1822, had been an alliance between Russia, Prussia, Austria and France, the ostensible object of which was to preserve the peace of Europe, but the real object of which was to prevent all changes in the direction of liberal institutions not, voluntarily, made by the sovereigns themselves. This alliance put down by armed intervention all movements for free government in Europe and in 1821 and 2 and 3, absolutism was reinstated. Having thus settled European affairs they proposed to direct their attention to the country which was claimed by Spain in the New World. At that time the Spanish colonies of America had substantially acquired their independence. That had been acknowledged by the United States, and, although Great Britain had not acknowledged their independence, she had sent consuls to their principal ports; though Spain still claimed them. The fear that they would attempt to interfere with these Spanish colonies was justified by their language. In this posture of affairs, Mr. Canning, for Great Britain, in August and September, 1823, urged upon the United States minister, Mr. Rush, the propriety of making with Great Britain a combined declaration to the effect that, whilst Great Britain and the United States did not themselves desire to take possession of any portion of these Spanish American colonies, and did not desire to throw any obstacles in the way of

any amicable settlement which might be made between Spain and her American colonies, they could not see with indifference the intervention of any foreign power or the transfer of any of these colonies to such powers. Mr. Rush, having no authority to make such a declaration on the part of his government, declined the proposal but submitted the matter to his home government. In Mr. Monroe's cabinet, at that time, were John Quincy Adams and John C. Calhoun, before whom Mr. Monroe laid this proposition, and besides these, he submitted the matter to Mr. Jefferson, then in retirement. Mr. Jefferson replied in an elaborate letter of the 24th of October, 1823, (see Randall's Life of Jefferson, vol. 3, p. 491,) and in that letter he says: "Our first maxim should be never to entangle ourselves with the broils of Europe and never to suffer Europe to intermeddle with cis-Atlantic affairs." Then referring to the great power which Great Britain could exercise for good or for evil in these controversies, he advised Mr. Monroe to unite with Great Britain in this declaration, "That we aim not at the acquisition of any of these possessions; that we will not stand in the way of any amicable arrangement between the colonies and their mother country; that we will oppose with all our means the forcible interposition of any other power as auxiliary, stipendiary, or under any other form or pretext, and most especially their transfer to any power by conquest, cession or acquisition in any other way." It will be seen, however, that the administration did not accept Mr. Canning's proposal or that of Mr. Jefferson, but spoke for the United States alone, and not in the terms proposed by Mr. Jefferson. Speaking of this threatened forcible interference in the internal affairs of Spain, Mr. Monroe says: "To what ex-

tent such interposition may be carried, on the same principle is a question in which all independent powers whose governments differ from theirs are interested and even those most remote, and surely none more so than the United States. Our policy with regard to Europe which was adopted at an early stage of the wars which have so long agitated that part of the globe nevertheless remains the same; which is not to interfere with the internal concerns of any of its powers: * *

* * * * But in regard to these continents circumstances are eminently and conspicuously different. It is impossible that the allied powers should extend their political system to any portion of either continent without endangering our peace and happiness; * * * * It is equally impossible, therefore, that we should behold such interposition in any form with indifference. If we look to the comparative strength and resources of Spain and those new governments and their distance from each other, it must be obvious that she can never subdue them. It is still the true policy of the United States to leave the parties to themselves in the hope that the other powers will pursue the same course. We owe it, therefore, to candor and to the amicable relations existing between the United States and those powers to declare, that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety." Now, conceding for the sake of argument, that this is a declaration which is entitled to be designated as a doctrine and the settled policy of the United States, let us see what it amounts to. Mr. Jefferson had proposed that the declaration should amount to a prohibition on the part of the United States of the acquisition of any territory by these

powers on the Western Continent by "conquest, cession or any other way," in addition to that of an interference between the colonies of Spain and their mother country. Mr. Monroe makes no mention of the former but, expressly, confines his declaration to the latter. This declaration, therefore, amounts only to one, opposing any interference on the part of the allied powers between Spain and her Spanish American colonies for the purpose of aiding the former, and, expressed generally, it would only amount to a declaration that the United States would not regard with indifference any interference on the part of the European powers between the people of the cis-Atlantic countries and their established governments, or their mother country as the case might be, but would regard any such interference as dangerous to their peace and safety. It will be remembered that the other declaration only had reference to the acquisition of title to unoccupied territory on our Northwestern coast, by occupation or colonization. And so even granting this to be a *doctrine* it has no possible application to acquisition of territory in any other way than by occupation or colonization. The only portion, therefore, of this Monroe doctrine of any practical importance to us now is that which has reference to our opposition to any interference in the political affairs of the American Continents. During the life of John C. Calhoun, and whilst he was in the Senate of the United States, Mr. President Polk asserted the proposition, in his message in relation to Oregon and Yucatan, that the Monroe doctrine did have reference to the acquisition of title in other ways than by occupation and colonization, and Mr. Calhoun met the assertion by a prompt denial, and, in his speech on the proposed occupation of Yucatan made in the



VIRGINIA
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Senate on the 15th May, 1848, (see Calhoun's Works, vol. iv., p. 454), he showed that so much of Mr. Monroe's message as had reference to acquisition of title to territory at all, had never been submitted to his cabinet and formed no part of the principle that was intended to be announced by them, but was a disconnected position taken by Mr. Adams in his negotiations with Russia and England and was in that way incorporated into the message of Mr. Monroe, but he further showed that even granting that it had been, it only had reference, as before stated, to the acquisition of title to our Northwestern Pacific Coast, by occupation, and that had ceased to be a question of any practical importance at that time, as that country had been so occupied then, as to exclude the right to acquire title to any portion of it in that way. He states, distinctly, that the only question which was considered by the cabinet and which is entitled to be regarded as a doctrine at all is the declaration in regard to the interference of the powers, known as the Holy Alliance, with the political affairs of this country. Being a member of Mr. Monroe's cabinet at the time and there being no contradiction of this statement, the question as to what the Monroe doctrine is would seem to be settled.

PAGE 101—Sec. 212.—The word citizen is employed in law in different senses under different circumstances, but its ordinary signification is, a person owing allegiance to a government and entitled to protection from it, and it is in this sense that it is used in the Constitution of the United States. So far as Mr. Vattel states the doctrine on the subject of citizenship in this section he states it correctly, but there are other questions on this subject, not noticed by him, which it would be well to state. These have reference to the following:

1. Children born of the subjects of one power in the territory of another. 2. Illegitimate children born of a foreign mother. 3. Foreign women who have married the subject of a State. Upon these points the doctrine in United States, is, 1, That children of foreigners born here are American citizens if they elect to declare themselves so, whilst the children of American citizens born abroad are themselves citizens of the United States, unless the 14th amendment has changed this doctrine, upon which there is a difference of opinion; 2, Illegitimate children belong to the State of which the mother was the subject; and 3, Except in the United States, the nationality of a wife is merged in that of her husband, so that in those countries, when a woman marries a foreigner she loses her own nationality and acquires his; but here a native woman marrying a foreigner remains the subject of the State, though an alien woman marrying a citizen of the United States becomes herself naturalized, unless she continue throughout her husband's lifetime, a non-resident. Hall's Inter. Law, secs. 68, 69, 70.

Sec. 214.—In the United States Congress has prescribed the mode by which aliens become citizens. Ordinarily they are required to declare on oath before a court of record, having common law jurisdiction and a seal and clerk, two years prior to their admission, their intention to become citizens, and, at the time of their application to be admitted, they are required to take an oath to support the Constitution of the United States, to renounce all allegiance to every foreign power, and, especially by name, to the prince whose subjects they are; they must show that they have resided in the United States five years, and within the State in which the

Boyd vs. Hay - 143 U.S. 179.

court is held one year, and that they have behaved as persons of good moral character. In case of persons residing in the United States before the 29th January, 1795, two-years' residence is sufficient; in case of persons residing here between 18th June, 1798, and 18th June, 1812, no declaration of intention is necessary; and in case of aliens honorably discharged from military service in the United States no declaration of intention is required, and one year's residence within the United States only is required. In case of minors three years of their minority before twenty-one are included in the five years' required residence. If parents are naturalized their minor children, if dwelling in the United States, are naturalized. Another question connected with this subject is what is the effect of incomplete naturalization? By statute if an alien has made the declaration on oath above-mentioned, and dies before the completion of his naturalization, his widow and children are considered as citizens of the United States, and are entitled to all the "rights and privileges as such upon taking the oaths prescribed by law." It was contended by the United States in the case of Martin Kotza, who, before he completed his naturalization, was seized by the Austrian government in Turkey, that he was entitled to protection as a citizen of the United States, and under this contention he was returned to the United States, but the better doctrine seems to be that incomplete naturalization does not entitle the party to protection as a citizen of the United States. Revised Stats. U. S., secs. 2165 to 2174 inclusive. 1 Minor's Inst., pp. 138 to 141. Woolsey's Internat. Law, sec. 80. Hall's In. Law, sec. 72.

PAGE 102—Sec. 216—The general doctrine stated in this

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section, that the vessels of a nation are considered as parts of its territory, and the State to which they belong retains its jurisdiction over them, is, according to a decision of the Supreme Court of the United States, subject to this limitation, that this jurisdiction is confined to all matters of discipline and all things done on board which affect only the vessel or those belonging to her, and do not involve the peace and dignity of the country or the tranquility of the port. If acts done affect these, then the local tribunals have jurisdiction.

Mr. Hall thus states the principle:

“A State has—

1. Administrative and criminal jurisdiction so as to bring all acts cognizable under these heads, whether done by subjects or foreigners, under the disciplinary authority established in virtue of State control on board the ship and under the authority of the State tribunals.

2. Full civil jurisdiction over subjects on board, and civil jurisdiction over foreigners to the extent and for the purposes that it is exercised over them on the soil of the State, unless partial exemption is given to them when on board ship by the municipal law of the State.

3. Protective jurisdiction to the extent of guarding the vessel against interference of any kind on the part of other powers, unless she commits acts of hostility against them, or does certain acts during war between two or more of them which belligerents are permitted to restrain, or finally escapes into non territorial waters after committing, or after some one on board has committed, an infraction of the law of a foreign country within the territory of the latter.” These principles apply, of course, to merchant vessels, and seem to be sup-

ported by reason and by the decisions of the Supreme Court of the United States, by Mr. Webster in the Creole case, and by Mr. Secretary Bayard in the Gomez case, though it seems that there are differences of opinion upon this point in the authorities on International Law. The political department, in August, 1890, through its Secretary of the Navy, seems, however, to repudiate this doctrine in the dismissal of Commander Reiter for not preventing the capture of Gen. Barrundia on board the merchant ship Acapulco, in one of the Guatemalan ports by the authorities of that nation. The facts of that case, however, have not appeared in any official shape, and therefore the circumstances when known may not justify the statement of a difference between the executive and judicial departments of the government on this question. U. S. vs. Diekelman, 92 U. S. 520. Wildenhus' case, 120 U. S., p. 12. Hall's Internatl. Law, secs. 76 and 77. Nation, vol. 52, pp. 44, 84, 150, 172, 213, 354. Alb. L. Jour., vol. 42, p. 345, and the authorities there cited.

PAGE 103—Sec. 218.—This would be a better definition of settlement. Settlement, or domicile, is a fixed residence of a person in any place without any present intention of removing therefrom, and to which, whenever he is absent therefrom, he has the intention of returning. This is certainly sufficient for belligerent purposes. Story on Con. of Laws, sec. 43. Wharton on Con. of Laws, sec. 23. Hall's Inter. Law, sec. 168. Putnam vs. Johnson, 10 Mass. 501. Crawford vs. Wilson, 4 Barb. 520.

PAGE 105—Sec. 223.—Until recently we had no statute on the subject of expatriation in the United States, and the courts had decided that in the absence of such a statute it could not

be done, but now by declaration of July 27, 1868, known as the Expatriation Act, it can be done. This Act was intended to remedy this defect but it does not specify how it may be done. It declares the right of expatriation to be "a natural and inherent one of all people" and that "any declaration, instruction, opinion, order or decision of any officer of the United States, which denies, restricts, impairs or questions this right, is inconsistent with the fundamental principles of this government." The mode of expatriation in Virginia is, 1st, By deed in writing, executed in the presence of and subscribed by two witnesses and by them proven in the court of the county or corporation where the party resides, or 2nd, By open verbal declarations made in such court and entered of record, declaring that the party relinquishes the character of a citizen and then departs from the State; or 3rd, If, after he is 21 years old, he resides elsewhere and in good faith becomes a citizen of another State, but no such act done during a war in which the State of the United States is engaged shall have this effect. Revised Stats. U. S., secs. 1999, notes by Gould and Tucker. Code '87, secs. 40, 41, 42.

PAGE 108—Sec. 233.—The question mentioned in this section arose in the year 1886 in the United States in the Cutting case. In that case A. K. Cutting, a citizen of the United States, was arrested in Mexico for a libel published in the United States against a citizen of Mexico and the question was whether the Mexican authorities could try him for that offence. The United States denied any jurisdiction to Mexico in this case and maintained that to give Mexico jurisdiction in any criminal case the offence must be committed in her own country. In some States it is maintained that offences

against the *State*, committed in another country, or offences against *citizens* of the State by a foreigner, which cannot be tried in the country where committed, may be tried in the State when the person is found there; but the better opinion seems to be that contended for by the United States in the Cutting case—that the State has no jurisdiction to try offences outside of its territorial limits by foreigners. See Report of J. B. Moore, Asst. Sec. of State, in Cutting case. Hall's Inter. Law, sec. 62.

PAGE 111—Sec. 241.—By the Constitution of the United States this right of imposing taxes is confined to the House of Representatives—that provides that, “all bills for raising revenues shall originate in the House of Representatives.” Art. I, sec. vii, clause 1.

PAGE 112—Sec. 244.—By the 5th amendment to the Constitution of the United States this right of eminent domain is limited as follows: “Nor shall private property be taken for public use without just compensation;” and it further provides that no one shall be deprived of his property without due process of law. This due process requires “*first*, the legislative act, authorizing the appropriation, pointing out how it may be made, and how the compensation shall be assessed; and *second*, that the parties or officers proceeding to make the appropriation shall keep within the authorities conferred and observe every regulation, which the act makes for the protection, or in the interest of the property owner, except as he may see fit voluntarily to waive them.” Story on Const., sec. 1956. Redfield on R., 239—241. *

PAGE 115—Sec. 250.—By this section, although it is claimed that the right to make a will disposing of property

after death is a natural right, it does not appear to have been in use at all in ancient times, according to our modern conceptions. In England it was not until the 32 Henry VIII (1541), that a statute of wills was passed.

PAGE 119—Sec. 265.—A ruler has no power, as was claimed in ancient times, to make any valid alienation of his territory, by way of barter or sale. The State itself cannot in justice make an alienation of any part of its territory without the consent of the inhabitants residing in such territory, and when this is done, after conquest, it is only the acknowledgment of an unavoidable fact. The tendency of modern international law is to act upon the principle that no alienation can be made without the consent of those residing within the alienated territory. In 1860 Sicily, the Marches and Umbria were annexed to Italy in that way, and in 1866 Schleswig-Holstein was annexed to Prussia in that way.

PAGE 120—Sec. 266.—An act of the Congress of Vienna in 1815 declared that the use of streams separating or traversing the territory of different powers, should be entirely free and not be denied for the purposes of commerce to any one, being subject only to police rules which should be uniform for all. And now it may be said that, by the action of this Congress and by treaty, all the navigable rivers of Europe and America are open to free navigation. But, whilst this is the case and whilst it seems to be the tendency of nations to adopt this course, it is maintained that, as a matter of fact, this right of free navigation is rather a matter of enlightened public policy than of international law, and that a State has, under the strict rule of international law, the right to interdict the free navigation of its rivers and to impose such terms as

it may choose upon other nations for their use. If this be conceded, it is submitted that it would be so wrong in a moral sense, and so foolish to exercise this right, that it might be said really not to exist, except under very peculiar circumstances. For a full discussion of this question, see Hall's Intern'l Law, sec. 39.

PAGE 120—Sec. 268.—Alluvion may be said to be the addition made to riparian land by the washing of a river, or other stream, or body of water, whenever the increase is so gradual that it cannot be perceived in any one moment of time. In cases of the formation of islands in a river, those wholly on one side of the centre, or deepest channel of the river, belong to the State owning the nearer shore; and so islands formed at the mouths of rivers, in the sea, by the alluvion brought down by the river, as they grow, become the property of the State owning the coast. *Jeffries vs. East Omaha Land Co.*, 134 U. S., p. 192. Hall's Inter. Law, sec. 37.

PAGE 123—Sec. 274.—There seems to be a difference in different parts of the United States on the question of the ownership of lakes. In the New England States it seems that by express reservation all small inland lakes, that are ponds of over ten acres, belong to the State. In the Western States the doctrine seems to be that the proprietorship of the beds of such lakes has not been retained by the United States, nor did it pass to the States when they entered the United States, but the beds belong to the adjacent owners of the land bordering thereon. See vol. 13 Cent. L. Jour., p. 5. *Ibid*, vol. 32, p. 291 and cases cited. *Cummings vs. Barrett*, 10 Cush. 188. *Hardin vs. Jordan*, 140 U. S. 371.

PAGE 125—Sec. 281.—It was against this claim of the

Portugese, mentioned here, that Grotius wrote his "Mare Liberum" in 1609 in which he refutes this claim, and denies the right of property in the open sea and advocates the right of the free navigation of it. The English asserted the same claim in the 17th and 18th Centuries and Russia, at a more recent date, based an exclusive claim to the Pacific north of the 51st degree upon the ground that this part of the Pacific Ocean was a passage to shores lying exclusively within her jurisdiction. This claim was resisted both by the United States and Great Britain and finally, in the years 1824 and 1825, was abandoned, and so, until recently, it might be said that the freedom of the open sea was generally admitted. Lately the United States, however, having acquired Russia's right to a part of the land owned by her when she was claiming property in the open sea, has been disposed to reassert this right abandoned by Russia. This claim seems now, though, to be virtually abandoned by the United States, and she asserts her right not to the open sea but to the protection of the seals, in the open sea, which breed on the islands which she acquired by purchase from Russia. To claim this as a right seems at war with the soundest principles of international law. All nations are, however, interested in their protection, and it is hoped that some amicable arrangement may be made by which the seal fisheries will be protected from poachers. See on this subject of the seal fishery, the *Forum* for November, 1889.

PAGE 127—Sec. 287.—We do not think the statement made here, with regard to the right to claim property in the sea near the coasts is true in as broad a sense as is stated. The right to prohibit foreign fishermen from catching shell fish

seems to have reasons peculiar to itself and which do not apply to other cases. They are caught near the shore within tide waters and need laws for their protection at certain seasons; and they may be cultivated by private persons on their own lands: they need, in short, a police which is not required for fish in a proper sense of the term. See Amer. Law Rev. for July, '77, article by Judge Foster.

PAGE 128—Sec. 289.—This has reference not to the question of ownership of the sea but to dominion over it for the purpose of protection. According to the current of modern authority the general territorial jurisdiction for this purpose extends into the sea as far as cannon shot will reach and no further, and this is, generally, calculated now to be a marine league, or three miles. As improvements are made in gunnery this distance may be increased, but, so far, this has not yet been done. Chancellor Kent was of the opinion that in the United States, on account of the peculiar conformation of its coast line we might demand more, and that it would not be unreasonable for us to claim an immunity from belligerent warfare for the space between the gulf stream and the shore, but, so far, no such claim has been conceded to us. There is another question with regard to this marine league which has arisen in England, and that is, whether crimes committed within this portion of the sea, by persons on foreign vessels, come within the jurisdiction of the courts of the adjoining land. The *Franconia*, a German steamer, commanded by Keyn, a foreigner, whilst passing within 3 miles of the English coast, collided with an English vessel and sunk her, causing the death of one of her passengers. Some time after this Capt. Keyn came within English jurisdiction and was arrested and

tried for manslaughter. He was convicted of the offence in the Central Criminal Court, but on writ of error the case was reversed, and it was held that international law gave no such jurisdiction and that, in order that the English courts might have such jurisdiction, it must be given them by the municipal law of their own state. By Act 40 and 41, Vict., chap. 73, this jurisdiction has been given to the English courts.

PAGE 130—Sec. 292.—Bays of the sea are, generally, within the jurisdiction of the States to whose territory the promontories, embracing them, belong. Thus the Delaware and Chesapeake Bays belong to the United States, Hudson Bay and the Irish Sea are British territory, the Caspian Sea belongs to Russia, Lake Michigan to the United States. The Black Sea is subject to the joint jurisdiction of Turkey and Russia. The straits which have been most conspicuous in international history are those leading into the Baltic and Black Seas. Denmark asserted a claim over those leading into the Baltic and based her claim on immemorial usage. Denmark claimed the right to require vessels passing through these straits to pay tolls. This right was not resisted till the year 1840. In that year attention was called to this subject by England and this resulted in negotiations which removed in a measure the complaints. In 1843 the government of the United States called in question the right of Denmark to charge such tolls at all, and denied this right, but proposed, as a settlement of the matter, that the United States would pay as a commutation for the claim, asserted by Denmark, the sum of \$250,000. This was not accepted and five years afterwards our diplomatic representative was instructed to inform Denmark that we could not recognize this right. The next year the President

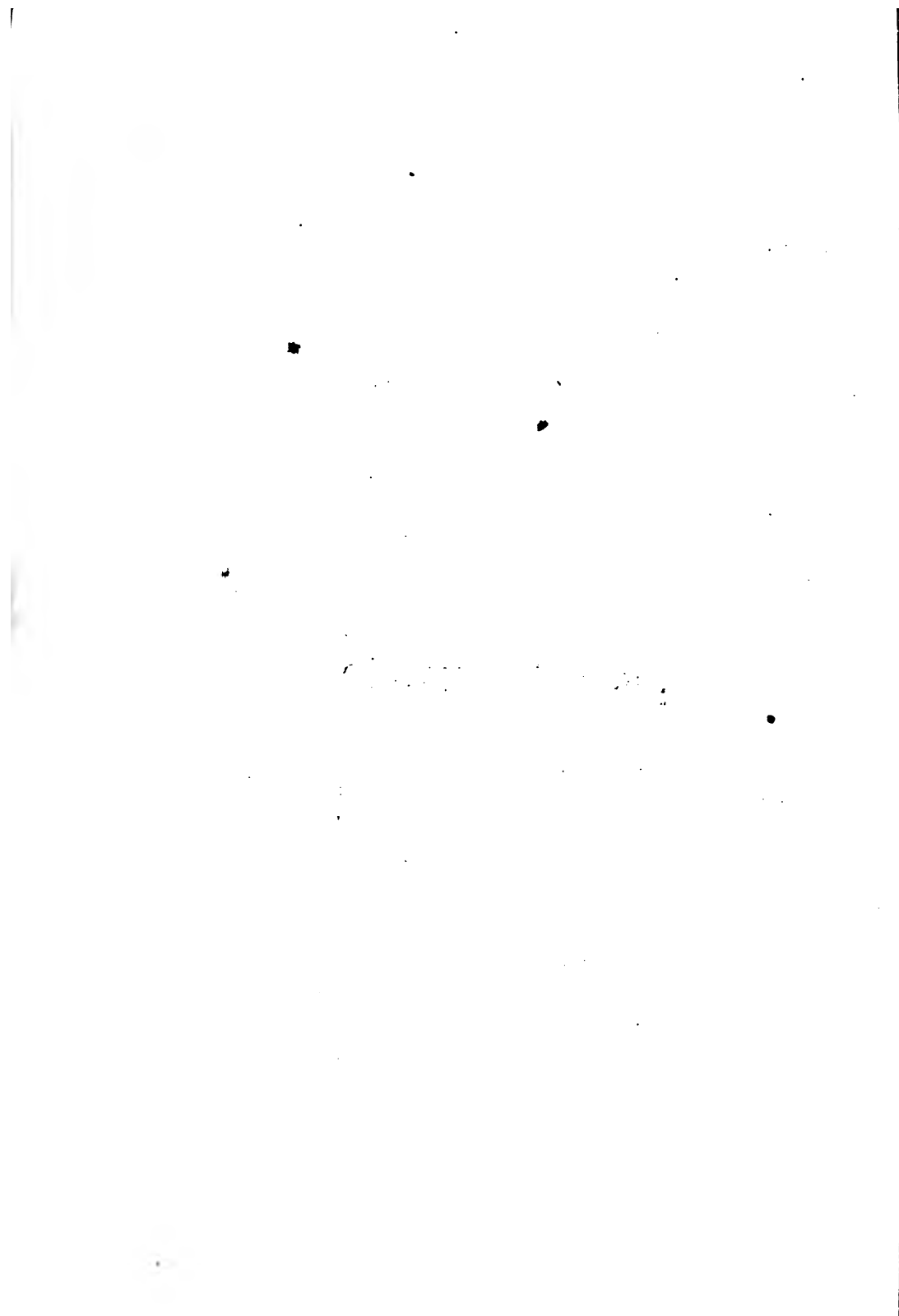
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of the United States advised that the treaty existing between Denmark and the United States, on the subject of these dues, be treated as at an end, and this was approved by the Senate, and notice was given to Denmark that the treaty would be regarded as at an end in a year from that time. Then in 1855 Denmark proposed an amicable adjustment of these sound dues claimed by her, and a congress of nations met at Copenhagen to consider the matter. That congress proposed, as a settlement of the whole matter, that all the nations should pay to Denmark the sum of \$17,500,000 and that Denmark should surrender this claim. This proposition was agreed to, and now these straits are free. The portion which the United States had to pay of this sum was \$393,011.

There seems to have been no dispute with regard to the straits leading into the Black Sea until Russia acquired territory on that sea, as before that it lay entirely within Turkish territory. After Russia acquired rights, however, this necessarily modified the rights of Turkey. By the treaty of Adrianople in 1829 entrance through those straits into the Black Sea was admitted to belong to Russia and to powers friendly to Russia. The ancient practice had been to prohibit all foreign vessels of war from entering the Bosphorus and the Dardanelles, and this practice had been sanctioned by the five powers, and Turkey, to the treaty of London in 1841. By the treaty of Paris, however, of March 30, 1856, the Black Sea was made neutral and open to the mercantile marine of all nations, but its waters and ports were, in perpetuity, interdicted to all war vessels of the bordering or any other powers. This treaty, however, gave to Russia and Turkey the right to enter into an arrangement with regard to a small force to be

kept within the sea for coast service. These powers agreed to permit the two to maintain six steam vessels of not over 800 tons, and four light steamers, or sailing vessels, of not over 200 tons burden each. The treaty of 1871 has made changes in this arrangement, and, now, by that treaty, Turkey has the right of opening these straits in time of peace to ships of war of friendly and allied powers, and, by a treaty between Russia and Turkey, Russia has recovered the right of maintaining her fleets of whatever size in the Black Sea. On the whole question it may be said that it will depend on the width of the strait and the distance between the promontories at the entrance of bays, whether the States, owning the territory bordering on them, will be permitted to assert any special property in them. Hall's Int. Law, sec. 41.

BOOK TWO.



BOOK TWO.

PAGE 142—Sec. 18.—In note 95 on this page, the question is discussed as to the right of one nation to recognize a revolted colony before its independence has been acknowledged by the parent State. We must distinguish, here, between the recognition of belligerent rights and the recognition of independence. So far as the parent country is concerned it may recognize as belligerents its revolted subjects for the purpose of alleviating the horrors of war, and may recognize them as having the same rights, so far as warlike operations are concerned, as if they had gained their independence. In that event the parent State puts itself under obligations to treat its subjects, until the war ends, as enemies and not rebels, and, thus, asserts its intention, so far as other countries are concerned, to confer upon them the rights of neutrality. With regard to other countries, they may recognize the revolted subjects as belligerents whenever a considerable population is

arrayed in arms with the professed object of obtaining political ends, and there is a possibility that the interests of their country may be so affected by the existence of hostilities, where one of the parties is not in the enjoyment of belligerent rights, as to make recognition a reasonable measure of *self-protection*. These are stated as the rules by which nations should be governed in the recognition of the *independence* of the revolted subjects.

1. Definitive independence cannot be held to be established, and recognition is consequently not legitimate, so long as a substantial struggle is being maintained by the formerly sovereign State for the recovery of its authority.

2. A mere pretension on the part of the formerly sovereign State, or a struggle so inadequate as to offer no reasonable ground for supposing that success may ultimately be obtained, is not enough to keep alive the rights of the State, and so to prevent foreign countries from falling under an obligation to recognize, as a State, the community claiming to have become one. Hall's Inter. Law, secs. 5, 26.

PAGE 147—Sec. 34.—Consuls, on exhibiting proof of their appointment, if not objectionable persons, receive an exequatur, or permission to discharge their functions within the limits prescribed, which permission may be withdrawn for any misconduct, and, perhaps, the State may have the right to withdraw it of its own pleasure and without assigning any cause for it. In 1861 the exequatur of the British consul at Charleston, S. C., was withdrawn and no reason assigned for it, and Lord Russell did not deny the right of the United States to do so. This exequatur consists of a letter patent signed by the sovereign and countersigned by the minister of

foreign affairs, but, in the United States, no formal exequatur is issued, the consul only receiving notice that he is recognized. As since Vattel's day these agents have become very important, it will be well to state their duties in general. They receive protests and reports of captains of vessels of their nation with reference to injuries sustained at sea; they legalize the acts of judicial or other functionaries by their seal for use within their own country; they authenticate births and deaths; they administer the property of subjects of their state dying in the country where they reside; they send home shipwrecked and unemployed sailors and other destitute persons; they arbitrate on differences which are voluntarily brought before them by their fellow-countrymen, especially in matters relating to commerce, and to disputes which have taken place on board ship; they exercise disciplinary jurisdiction, though not of course to the exclusion of the local jurisdiction over the crews of vessels of the State in the employment of which they are; they see that the laws are properly administered with reference to its subjects, and communicate with their government if injustice is done; they collect information for it upon commercial, economical and political matters. In many non-Christian lands the function of judging in civil and criminal cases has been secured by treaty to consuls, where their own countrymen are concerned. By the treaties of United States with China in 1844 and 1858 the citizens of the United States committing crimes in China are subject to be tried, and punished only by the consul. Disputes, also, between citizens of the United States, or between them and other foreign residents, are tried, not by the authorities of China, but, in the former case, by the United States

authorities, and, in the latter, by persons agreed upon by their respective governments. The best authorities seem to think that it is at the option of the sovereign, whether the consul shall be independent of the ordinary criminal justice of the place where he resides, and that during their term of office they have no special privileges beyond other foreigners, but are subject both to the civil and criminal laws of the country where they reside, and so the law stated by Wicquefort is the correct law with regard to them. But, whilst this is the case, according to strict law, yet the rights, mentioned as accorded to them by Vattel, are usually accorded them as a matter of comity. Hall's Inter. Law, sec. 105.

PAGE 155—Sec. 56.—Although it is desirable that nations should interfere only in the quarrels between a sovereign and his subjects for the purpose of self-preservation, or when a breach of the law, as between States, has taken place, or when the whole body of the civilized world has concurred in authorizing it, yet the weight of authority amongst writers on international law is in favor of the view presented in the text of Vattel. A circular issued by the Russian government, when France and England suspended diplomatic relations with Naples in consequence of the inhumanity with which the kingdom was ruled, presents the former view. "We could understand," it says, "that as a consequence of friendly forethought one government should give advice to another in a benevolent spirit, that such advice might even assume the character of exhortation; but we believe that to be the farthest limit allowable. Less than ever can it now be allowed in Europe to forget that sovereigns are equal among themselves and that it is not the extent of territory, but the sacred char-

acter of the right of each, which regulates the relations that exist between them. To endeavor to obtain from the King of Naples concessions as concerns the internal government of his state by threats, or by menacing demonstration, is a violent usurpation of his authority, an attempt to govern in his stead: it is an open declaration of the right of the strong over the weak." We have already indicated, in notes to section 18, page 142, when interference can be made between sovereign and his revolted subjects.

PAGE 162—Sec. 75.—Letters Rogatory are now only used in obtaining the testimony of witnesses out of the jurisdiction. When the testimony of a foreign witness is necessary the court before which the action is pending may send to the court within whose jurisdiction a witness resides a writ, usually termed a letter rogatory. By this instrument the court abroad is informed of the pendency of the cause, and the names of the foreign witnesses, and is requested to cause their depositions to be taken in due course of law. This writ is, usually, accompanied by interrogatories to be propounded to the foreign witnesses.

The Judge of the foreign court then calls the witnesses either before himself or before his commissioner, causes the testimony to be taken, properly authenticated and returned to the court sending out the letter, with the letter itself. Greenleaf on Ev., vol. 1, sec. 320.

PAGE 166—Sec. 85.—The note on this page and succeeding ones has reference to what is known as Private international law or, as it is sometimes called, the Conflict of Laws. It treats of the relations of states with the citizens or subjects of other states, and determines in certain cases whether the

courts of a state are to apply their own municipal laws, or that of another state, in the decision. It is not a part of international law proper, but is merely a subdivision of it, and derives its force from the sovereignty of the States administering it. As these notes, however, treat of this subject briefly, it may be well to settle how far they express the true state of that law at present. For a full discussion of this branch or subdivision of the law the student is referred to Story on Conflict of Laws, Wharton on Conflict of Laws, Bar's International Law, Westlake on Private International Law, Phillimore's International Law, vol. iv.

The first part of note 107 has reference to the effect of judgments of condemnation in prize cases and the principles there stated are true in regard to these and are, also, the same with regard to all judgments *in rem*, which are judgments or proceedings against the property or thing itself, as distinguished from judgments or proceedings against the person. It may be said, generally, that, if the matter in controversy is land or other immovable property, the judgment pronounced in the *forum rei sitæ* is held to be of universal obligation as to all the matters of right and title which it professes to decide in relation thereto. But it is not so universally settled that the judgment is conclusive of all the points, which are incidentally disposed of by the judgment, or of the facts or allegations upon which it professes to be founded; and this same principle applies to all other cases of proceedings *in rem* against movable property within the jurisdiction of the court pronouncing the judgment. With respect to foreign judgments *in personam* it may be said that they are only *prima facie* evidence upon the question of whether the foreign court had

jurisdiction of the subject-matter, or of the person of the defendant, or whether the judgment was regularly obtained: but if there be objection on this ground, it is conclusive upon the defendant so far as to prevent him from alleging that the promises upon which it was founded were never made. The judgment, however, may be impeached for fraud. These are the rules by which it may be determined whether a judgment rendered in one country has effect extra territorially. They have extra-territorial force:

1. When rendered by the courts of the State in which the defendant has his domicile, in all suits *in personam*, and in all possessory actions concerning movables of which the forum *rei sitæ* has not jurisdiction. *in rem*

2. When rendered by the courts of a state by whose laws a contract is to be adjudicated, where the debtor personally resides in such state, or has in it property not merely illusory, provided that in such cases the judgment is based on the contract either for its execution or rescission.

3. When rendered by the courts of a state in which a tort or wrong has been committed, where the suit is for damages against the wrong doer, provided such damages are compensatory and not vindictive.

4. When rendered by the courts of a state in which are situated either goods or claims, when such goods or claims are attached, the judgment in such case being effective up to the value of such goods or claims, when it is rendered on the cause of action for which the attachment is laid, the court having jurisdiction of such cause of action.

5. When rendered by the courts of a state in all proceedings in rem—as to things situated in such state, whether

movable or immovable—provided that such things have a continuous abiding place.

6. When rendered by the courts of a state to which the parties have voluntarily submitted themselves, except in regard to their status.

If the foreign judgment be *in personam*, it must be for a fixed sum. Want of jurisdiction may be always pleaded to an action upon a foreign judgment, or it may be impeached for a gross violation of international law, or for fraud—otherwise they are conclusive on the merits. There is a difference, however, between a foreign judgment, when offered as a plea in bar by the defendant, and when presented by a plaintiff as the foundation of his action. In the latter case, the defendant can plead the incompetency of the court, or the gross injustice of the judgment on international principles. In the former case, the plaintiff is estopped from prosecuting his action further, and cannot reply that the court did not have jurisdiction, for the reason that the court was a court of his own selection.

The rules as to the effect of foreign divorces are the same, with this additional requirement, that the parties must be domiciled within the jurisdiction where the divorce is granted, except that if the husband abandons his domicile and the wife remains behind she is entitled to a divorce by that law. The domicile required in cases of divorce is what is styled a matrimonial domicile, and not a complete domicile, such as would regulate the succession of property, and is somewhat synonymous to residence. Wharton on the Con. of Laws, secs. 210, 829. Story on Con. of Laws, sec. 230a, 591, 592, 593, 595, 604. Greenleaf on Ev., vol. 1, secs. 541, 543. Bars. In. Law

380—385. Westlake's Private Int. Law, p. 75. Hall's Int. Law, sec. 10.

In this note, secondly, it is said that the prize court must have, at the time it pronounces sentence of condemnation, sat actually in the country to which it belonged, and not within the dominions of any foreign prince or ally. The present doctrine is that the court may lawfully sit in the country of its ally. Wheaton's Int. Law, secs. 385, 386. Kent's Comm., vol. 1, side p. 103. It is said, thirdly, that the ship or other property condemned as prize, must, at the time of condemnation in general, be actually in the country where the sentence was pronounced. To this it would be well to add these words, "unless in cases of necessity and there may be lawful condemnation of prizes which have been carried into a neutral port, where the court sits in that of its own sovereign or of his ally." Kent's Comm., vol. 1, side p. 104. Hall's Int. Law, sec. 226.

In this country the doctrine is that the rights and powers of guardians are strictly local and they have no control over either the person or property of the ward except in the country of their appointment, and if they desire any such authority they must obtain new letters of guardianship from the local tribunals. Story on Con. of Laws, secs. 497—505. Wharton on Con. of Laws, secs. 259—270.

In this country, as a general rule, the last domicile of the testator is to be resorted to as that by which the interpretation of a will is to be determined. A will executed according to the testator's last domicile will pass his moveable property wherever situate, but as to the real estate or immovables it must be made according to the *lex rei sitæ*. Wharton on

Con. of Laws, secs. 585, 587, 592 and 599. Story on Con. of Laws, secs. 468, 474.

PAGE 171—Sec. 100.—As for instance the laws of the United States prohibiting the immigration of the Chinese. 25 Stats. at Large, p. 476, 504. Tucker and Gould's Notes, p. 502.

PAGE 172—Sec. 103.—This is the general principle stated in text, but there are certain classes of aliens, who are, by the comity of nations, exempted, in a greater or less degree, from the control of the law in the land of their temporary sojourn. And these classes are: 1. Sovereigns traveling abroad with their trains. 2. Ambassadors and ministers, their suite, family and servants, and, 3. Officers and crews of public armed vessels in foreign ports and armies in their permitted transit through foreign territories. Note 111 on this page discusses the question of what law governs in cases of bills of exchange. This may be stated to be the law on that subject. Such paper is governed by the law of the place of contract as to its validity, nature, obligation and interpretation, if the performance of the contract is to be in the place where it is made, either expressly or by tacit implication: but where the contract is, either expressly or tacitly, to be performed in any other place then the rule is that the contract as to its validity, nature, obligation and interpretation is to be governed by the law of the place of performance, and so "The drawer is liable on the bill according to the place where the bill is drawn, and the successive endorsers are liable on the bill according to the law of the place of their endorsement, every endorsement being treated as a new and substantive contract. The consequence is that the endorser may render himself, upon the dishonor of

*Platons. L. 17. 202 3. 2. 10. 10. 10.
154 U.S. 196-197*

The sovereign has a right of jurisdiction
 within his territory, and all subjects, where
 and when they are within his territory,
 are under his power, and he is responsible
 for their acts, and for those of his subjects, where
 they act as such, and for those of his
 subjects, where they act as such.

17 Nov 1856

John D. Smith

a bill, liable for a much higher rate of damages than he can recover from the drawer." Wharton on Con. Laws, sec. 401. Story on Con. of Laws, secs. 280, 314. As to the remedy, the rule is that the law of the place where the suit is brought must be pursued and extends generally to the determination of; 1. The parties who may sue, 2. The time within which the suit may be brought, 3. The form of action and, 4. The nature, effect and extent of the remedy applied. In Virginia there is a modification of the second principle by statute which provides that, "Every action upon a judgment or decree rendered in any other state or country shall be barred, if by the laws of such state or country such action would be barred there and the judgment be otherwise incapable of being enforced there, and upon a contract which was made and was to be performed in another country, by a person who then resided therein, no action shall be maintained after the right of action thereon is barred by the laws of such state or country."

The weight of authority is that the law of the domicile governs as to the capacity of the parties to make the contract, though upon this point there is a considerable conflict, many authorities holding that the law of the place of contract governs. Story on Con. of Laws, secs. 52, 63—69. Whar'. on Con. of Laws, secs. 58, 88. Bar's Int. Law, sec. 52. Code '87, (Va.) secs. 2928, 2933.

It is stated in this note that the law of the place of the celebration of matrimony governs. Whilst this is true, as a general rule, yet there are well known exceptions to this and they are: 1. In cases of incest and polygamy, 2. When prohibited by positive law from motives of public policy, and, 3. When celebrated in desert or barbarous countries: where the per-

sons are, under the circumstances, entitled to the benefit of the laws of their own country. Story on Con. of Laws, secs. 113 to 120. Brook vs. Brook, 9 H. L. C., p. 193. Dupre vs. Boland's Ex'r, 10 La. Ann. 411. State vs. Bell, 7 Baxter 9. Kinney's case, 30 Gratt 858. Greenhow and als. vs. James' Ex'rs, 80 Va. 636.

That part of the note, which states that the English law and courts protect persons with regard to contracts violating the revenue laws of another state, is not a law in the United States, and is not believed now to be the law of England. By our view of contracts of this character they are illegal here, since, as the place of performing the contract is in the country whose laws are to be violated, they must be judged by the laws of that country and by those alone. Whart. on Con. of Laws, sec. 485. Story on Con. sec. 257.

The construction of the statutes of another state by the courts of that state will be accepted as authoritative in other states. And, as stated, foreign laws must, in general, be established as facts, and the courts will not take judicial cognizance of them. Whart. on Con. of Laws, secs. 430, 771—778.

The general rule is, as stated in text, that disputes relating to real estate must be decided by the courts where it is situated, but an exception is sometimes made where the parties are domiciled in a country other than that in which the real estate is situated. In such cases a court of chancery in the country of their domicile has claimed the right to compel them, when subject to its jurisdiction, to take specific action with regard to this real estate, not that they claim to have cognizance over the real property, but simply over the obedience of the party, and, through them, indirectly, over the real

estate. The doctrine, however, seems to be limited to cases where the act ordered may be done without the exercise of any authority operating territorially within the foreign jurisdiction where the real estate is situated. But even to this extent the doctrine is a questionable one. Westlake's Private Inter. Law, sec. 65. Whart. on Con. of Laws, secs. 288 to 291. Story on Con. of Laws, sec. 545. *Poindexter vs. Burwell* and als., 82 Va. 507. *Ibid Wimer and wife vs. Wimer* and als., p. 890.

PAGE 172—Sec. 105.—This expresses clearly the modern doctrine on this point. See Bluntschli, sec. 391. Hall's Int. Law, sec. 10.

PAGE 173—Sec. 108—*Note 112*.—The jurisdiction, by writ of *ne exeat*, is confined in the United States to cases where a bill is filed in chancery alleging the intention of the party, who owes a debt, quickly to depart from the country, but in no other cases. Abbot's U. S. Prac., vol. 1, p. 28. Revised Stats. U. S., sec. 717.

PAGE 174—Sec. 111.—These may be said to be the rules governing the questions mentioned in this section, where there are no local prohibitory laws existing in the country where the movable property is situated:

1. A will of personal or movable property regularly made according to the forms and solemnities required by the law of the testator's domicile is sufficient to pass his personal or movable property in every other country in which it is situated; and, in case of intestacy, this movable or personal property passes according to this same law.

2. The law of the place where the property is locally situated governs in the case of immovable property, both as to

the extent of the testator's powers to dispose thereof, and as to the forms and solemnities necessary to give the will its due attestation and effect; and, in the case of intestacy, the law of the place where situated governs its succession.

3. The law of the actual domicile governs as to the capacity or incapacity of the testator in case of movables; the law of the place where the property is locally situated as to immovables.

4. The law of the place where the will is made governs in the construction and interpretation of it, unless, in case of will with reference to immovables, it can be clearly gathered from the instrument, that the testator had in view the law of the place of *situs*, or unless he used language which necessarily referred to the usages and customs appropriate only to that place. It will be observed, therefore, that a very important question, and one to be first determined, is, where was the domicile of the party? We have seen, on page 103, sec. 218, that it is a fixed residence in any place, without any present intention of removing therefrom, and to which, whenever the person is absent, he has the intention of returning. See also Bishop on M. and D., vol. 2, sec. 118, as to domicile. The following rules, taken, in substance, from Story on Conflict of Laws, will be useful in reaching a determination as to domicile.

1. The place of birth of a person is his domicile, if, at the time of his birth, it is the domicile of his parents.

2. The domicile of birth of minors continues until they have obtained a new domicile.

3. Minors are generally deemed incapable, *proprio Marte*, of changing their domicile during their minority, and, therefore,

they retain the domicile of their parents; and if the parents change their domicile, that of the infant children follows it; and if the father dies, his last domicile is that of the infant children; but this may be, afterwards, changed by the mother whilst a widow, or by their guardian, if done *bona fide* and without fraud.

4. A married woman follows the domicile of her husband.

5. A widow retains the domicile of her deceased husband until she obtains another domicile.

6. *Prima facie* the place where a person lives is taken to be his domicile, until other facts establish the contrary.

7. Every person of full age having the right to change his domicile, it follows that if he removes to another place, with an intention to make it his permanent residence, it becomes instantaneously his place of domicile, but whilst he is in transit and until he acquires this new domicile *facto et animo*, his former domicile remains unless it be his return to his domicile of birth in which case that is re-acquired while he is on his way and becomes *eo instanti* his new domicile.

8. If a person has, actually, removed to another place with an intention of remaining there for an indefinite time and as a place of present fixed residence, it is to be deemed his place of domicile notwithstanding he may entertain a floating intention to return at some future period.

9. The place where a married man's family resides is, generally, to be deemed his domicile: if his family is fixed in one place and he does business in another the former is his domicile: if he has two places of residence, at different times of the year, that one will be regarded as his domicile which he himself selects, or describes, or deems to be his home, or which

appears to be the centre of his affairs, or where he votes or exercises the rights and duties of a citizen.

10. If a man is unmarried that is, generally, deemed his domicile where he transacts his business, exercises his profession or assumes and exercises municipal duties or privileges.

11. Residence in a place to produce a change of domicile must be voluntary; the mere intention to acquire a new domicile without the fact of an actual removal avails nothing, nor does removal without intention, and presumptions from mere circumstances will not avail against positive facts which fix or determine the domicile. Story on Conflict of Laws, secs. 43, 44—49, 506.

PAGE 175—Sec. 112.—In American Law, escheatage means the reverting of land to the State on the death of the owner; chattels reverting as *bona vacantia*.

PAGE 190—Sec. 149.—The principles set forth in this section are stated with great clearness in the case of *Indiana vs. Kentucky*, 136 U. S., page 479, decided by the Supreme Court of the United States in May, 1890. This was a suit with regard to the Green River Island tract. The court uses this language: "This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky, such omissions to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome except by the clearest and most unquestioned proof. It is a principle of public law universally recognized, that long acquiescence in the possession of terri-

tory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority."

PAGE 191—Sec. 151.—Sir Robert Phillimore does not seem to think that it is possible to fix any time in the case of international prescription and he gives these reasons for it which seem to commend themselves to favorable consideration: "Dereliction or voluntary abandonment by the original possessor may be often incapable of proof after the lapse of centuries of adverse possession, whereas, the proofs of prescriptive possession are simple and few. They are principally publicity, continued occupation, absence of interruption, aided no doubt generally, both morally and legally speaking, by the employment of labor and capital upon the possession by the new possessor, during the period of the silence, or the passiveness or the absence of any attempt to exercise proprietary rights by the former possessor. The period of time as has been repeatedly said cannot be fixed by International Law between nations as it may be by Private Law between individuals: it must depend upon variable and varying circumstances: but in all cases these proofs would be required." Phillimore's *Inter. Law*, vol. 1, p. 367.

PAGE 192—Sec. 153.—It would be well to add, at the end of this section, these words: "Such are treaties of cession, boundary, or exchange of territory, or those which create a permanent servitude in favor of one nation within the territory of another." Wheaton's *Int'l Law*, sec. 268.

PAGE 193—Sec. 156.—Although there is some conflict of authority in regard to doctrine stated in this section, the weight of opinion seems to be in favor of it. Especially would this be true as applicable to the United States, for, by the

Constitution of the United States (art. 2, sec. 2, clause 2), it is provided that the President "shall have power by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur," so that, with us, it is always an implied condition in negotiations with foreign powers that the treaties concluded by the President and his agents shall be subject to ratification in the manner prescribed by the fundamental laws of the State. In many of our treaties this provision is inserted, "this treaty shall be ratified in conformity with their respective constitutions or modes, and its ratifications exchanged as soon as possible." Wheaton's Int'l Law from sec. 256 to sec. 263.

PAGE 208—Sec. 192.—Mr. Wheaton designates these treaties as transitory conventions, and says that they are perpetual in their nature, so that, being once carried into effect, they subsist independent of any change in the sovereignty and form of government of the contracting parties; and although their operation may, in some cases, be suspended during war, they revive on the return of peace, without any express stipulation. Such are treaties of cession, boundary, or exchange of territory, or those which create a permanent servitude in favor of one nation within the territory of another. The treaty of peace between Great Britain and the United States in the year 1783 in regard to the fisheries on the coasts of the British possessions in North America, is claimed by the United States to be a treaty of that character, and out of this has grown the fisheries question, now a subject of dispute between the two countries. Mr. Wheaton, it is believed, gives a fair illustration of the character of such treaties, viz., those, amongst other things, which create a permanent servitude in

favor of one nation within the territory of another. Servitudes are said to be either negative, requiring a state not to do something within its own territory, or affirmative, imposing a duty upon a state of suffering something to be done within its territory. This right given to the United States by this treaty with regard to fishing would seem to come clearly within the meaning of an affirmative servitude, and so the whole contention, in relation to this dispute, resolves itself into the question of whether the United States abandoned her fishery rights under the treaty of 1783, except to the extent conceded to her by the treaty of 1818. A brief history of these treaties will throw light upon that question. By the 3rd article of the treaty of 1783, it was "agreed that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank and on all the other banks of Newfoundland; also in the Gulf of St. Lawrence, and at all other places in the sea, where the inhabitants of both countries used to fish, at any time heretofore; and also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use (but not to dry or cure the same on that island), and also on the coasts, bays and creeks of all other of His Britannic Majesty's dominions in America; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbors and creeks of Nova Scotia, Magdalen Islands, and Labrador, so long as the same shall remain unsettled; but so soon as the same, or either of them, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlement, without a previous agreement for that purpose

with the inhabitants, proprietors, or possessors of the ground." During the negotiations at Ghent, in 1814, between Great Britain and the United States, the British plenipotentiaries notified those of the United States that they did not intend to concede them these privileges again, and, in other words, notified them that they regarded such privileges as abrogated by the war of 1812 between the two countries. Their reply was that they had no authority to treat on this particular subject, and so, in the treaty of peace concluded at that time, no mention is made of this matter. This difference of view between the English government and the United States on the effect of this 3rd article led to the convention of 1818, between Great Britain and the United States, for the purpose of settling this difference. In the treaty concluded by this convention at that time, the first article reads as follows: "Whereas, differences have arisen respecting the liberty claimed by the inhabitants thereof, to take, dry, and cure fish on certain coasts, bays, harbors, and creeks of His Britannic Majesty's dominions in America, it is agreed between the parties that the inhabitants of the said United States shall have, forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Ramea Islands; on the western and northern coast of Newfoundland, from the said Cape Ray to the Quiripon Islands; on the shore of the Magdalen Islands; and also on the coasts, bays, harbors, and creeks, from Mount Joli, on the southern coast of Labrador, to and through the straits of Belleisle, and thence northward, indefinitely, along the coast, without prejudice, however, to any of the exclusive rights of the Hudson's Bay

Company; and that the American fishermen shall also have liberty, forever, to dry and cure fish in any of the unsettled bays, harbors, and creeks of the southern part of the coast of Newfoundland hereabove described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors or possessors of the ground; and the United States hereby renounce, forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks or harbors of His Brittanic Majesty's dominions in America not included within the above mentioned limits." Now, bearing in mind the circumstances under which this treaty was made, and the contentions of both parties, would it not be a fair construction of this last treaty to say that the United States abandoned a disputed right for the purpose of securing a right that would be *permanent*, and without dispute of a more limited character. And this seems to be the view of Messrs. Gallatin & Rush, two of the negotiators, for they say in a letter addressed to John Quincy Adams, Secretary of State, on October 20, 1818, amongst other things that "The most difficult part of the negotiation related to the permanence of the right. To obtain the insertion in the body of the convention of a provision declaring that that right should not be abrogated by war was impracticable. All that could be done was to express the article in such manner as would not render the right liable to be thus abrogated. The words 'for ever' were inserted for that purpose. The insertion of the words 'for ever,' was

strenuously resisted. We declared that we would not agree to any article on the subject unless the words were preserved, or in case they should enter on the protocol a declaration impairing their effect. It will also be perceived that we insisted on the clause by which the United States renounce their right to the fisheries relinquished by the convention, that clause having been omitted in the first British counter-project. We insisted on it with a view, first, of preventing any implication that the fisheries secured to us were a new grant, and of placing the permanence of the rights secured and of those renounced precisely on the same footing; second, of its being expressly stated that our renunciation extended only to the distance of three miles from the coast." There does not seem to be any intimation here that this was only intended as a renunciation *for the present* of any claim to our rights under the treaty of 1783 as is now contended. And this seems to have been the view of those who negotiated "The Chamberlain-Bayard Treaty" of 1888. That does not seem to be the view, however, of a majority of the United States Senate, and so that treaty was rejected, and this dispute is still unsettled. For a full discussion of this subject, see Wheaton's Internatl. Law, secs. 269 to 275. American Law Review, (Old Series) vol. 5, pp. 389 to 427. "Isham on the Fishery Question," and "Our Fishery Rights in the North Atlantic," by Jos. I. Doran, of Philadelphia.

PAGE 212—Sec. 197.—According to modern international law, no treaty of alliance could give to any nation any greater right of interference in such cases than it would have if there was no such treaty. This whole question depends upon whether there has arisen such a state of circumstances as would justify

interference independent of any alliance. Hall's Inter. Law, secs. 93, 4 and 5.

PAGE 215—Sec. 202.—The American authorities maintain the doctrine that the violation of any one article is a violation of the whole treaty, if the injured party elects to so consider it, unless there has been some stipulation that this shall not be the effect of it. It is presumed, however, that this contemplates a violation of some one, material to the main object and not one disconnected from it, and, therefore, an unimportant article, though it is not so stated. That would seem, at any rate, to be the soundest doctrine. Kent's Comm., vol. 1, side pages 175, 176. Wheaton's Intl. Law, sec. 550. Hall's Intl. Law, sec. 116.

PAGE 218—Sec. 209.—An agreement of this character was entered into between Gen'l Joseph E. Johnston for the Confederate States, and Gen'l W. T. Sherman for the United States at Durham, N. C., on the 18th day of April, 1865. They recognized this fact in the body of the agreement by stipulating as follows: "Not being fully empowered by our respective principals to fulfill these terms we individually and officially pledge ourselves to promptly obtain the necessary authority to carry out the above programme." Mr. President Davis promptly ratified it for the Confederate States, but President Johnson refused to ratify it for the United States, and so it was not carried into effect. If it had been ratified it would have saved the South the iniquities of the reconstruction policy. Eugene Field, in the *Chicago News*, gives the credit of this *sponsio* to Gen'l John C. Breckenridge, who was with Gen'l Johnston at the time. It will be seen in full in Johnston's Narrative, pp. 405 to 411.

PAGE 226—Sec. 214.—A subject can only sue his state by her consent and in the mode prescribed. The subject of another state is not so limited unless the fundamental laws so limit him.

PAGE 235—Sec. 235.—A guaranty is an engagement through which powers agree to aid another, where that other power is interrupted, or threatened to be, in the peaceable enjoyment of its rights by some third power. This agreement may be applied to every species of right and obligation, but is most commonly applied to treaties of peace. The stipulations may be made by a third power not a party to the treaty, by one of the contracting powers in favor of another, or mutually by all the contracting powers. The treaty of Aix-La-Chapelle was one of the latter character. We have a guarantee in the Constitution of the United States binding the United States to guarantee to every state in the Union a republican form of government. Wheaton's Intl. Law, sec. 277. Hall's Intl. Law, sec. 113. Const. of U. S., art. iv., sec. iv.

PAGE 236—Sec. 238.—A pragmatic sanction in law is a solemn order or decree of a sovereign promulgated by the advice of his council, or by any sovereign power, on some matter of importance, and has been applied specially, (1) to the decree issued by Charles VII of France, A. D. 1438, which was the foundation of the liberties of the Gallican church, (2) to the settlement of the Emperor Charles VI of Germany of his empire, on failure of male issue, on his daughter, Maria Theresa, (1713, A. D.), and, (3) to the decree or order of Ferdinand VII of Spain, (A. D., 1830), by which he established his daughter, Isabella, on the throne of Spain, revoking the Salic Law which had been introduced by the Bourbons and,

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thereby, excluding his brother, Don Carlos, from the throne. Another rule with respect to guarantees is that they apply only to rights and possessions existing at the time they are stipulated, and it was upon this ground, also, that Louis XV declared in 1741 in favor of the elector of Bavaria against Maria Theresa, the heiress of the emperor.

PAGE 237—Sec. 241.—Texas, prior to her annexation to the United States, had entered into a compact of *antichresis* with Great Britain by which she pledged her revenues for the payment of her bonds and interest.

PAGE 238—Sec. 246.—This is said to be the last instance of the use of hostages to secure the performance of any agreement other than a military agreement. In this case two British Peers, (Lord's Sussex and Cathcart) remained on parol at Paris until Cape Breton should be restored to France. Hostages are often used now for military purposes; to secure, for instance, the prompt payment of requisitions, or when a vessel is released on a ransom bill. They are sometimes seized in order to secure the maintenance of order in occupied territory. In 1870, in consequence of damage having been frequently done to railroads near their military lines, whilst in French territory, the Germans ordered that certain citizens of the country should be placed upon the engines, so that it might be understood that every accident of that kind would result in injury to their friends; but it is said that this practice was reprobated, as it violated the principle applicable to such persons, which is, that they are only to be kept in confinement. Hall's Intl. Law, secs. 115, 135, 140 and note, 157.

PAGE 243—Sec. 262.—There seems to be three reasons for having rules of interpretation: 1. The want of proper terms

to express ourselves with clearness and precision in all cases.

2. The impossibility of foreseeing and providing for all the particular cases that may arise under the terms of the treaty, and 3. The arising of new cases and questions which cannot come within the terms of the treaty except by inference drawn from the views presented in the treaty, and which were intended to be embraced therein.

PAGE 244—Sec. 263.—These are called maxims, because they are accepted by all persons as the highest authority and are so universally acknowledged as to become part of the treaty itself, and so are superior in point of authority to mere rules.

According to Dr. Lieber there is no writing which can truly be said to need no interpretation, for there is, necessarily, ambiguity in all human speech or writing, and so it is used here relatively.

PAGE 245—Sec. 266.—This maxim is frequently expressed in this way. If two meanings are admissible, that is to be preferred which is least for the advantage of the party for whose benefit a clause is inserted: for in securing a benefit he ought to express himself clearly. The sense which the acceptor of conditions attaches to them ought rather to be followed than that of the offerer.

PAGE 247—Sec. 270.—Or, as Dr. Lieber expresses it—Words are, therefore, to be taken as the utterer probably meant them, and in that meaning which agrees most with the character of both the text and the utterer. This mode of interpretation is frequently used in the consideration of wills, and has been thus expressed by the Supreme Court of the United States, in the case of *Clark vs. Boorman's Ex'r*, 18

Wall. 502, 3: "Under this state of the science of the law as applicable to the construction of wills, it may well be doubted if any other source of enlightenment, in the construction of a will is of as much assistance, as the application of natural reason to the language of the instrument under the light which may be thrown upon the intent of the testator by the extrinsic circumstances surrounding its execution, and connecting the parties and the property devised with the testator and with the instrument itself." See also *Blake vs. Hawkins*, 98 U. S. 324.

PAGE 248—Sec. 273.—Or as Dr. Lieber expresses it—Good faith, in interpretation, means the shunning of subterfuges, quibbles and political shuffling—it means that we take the words fairly as they are, and as they were meant. As there may be exceptions, however, to all general rules, he gives one to this which is regarded as praiseworthy. After King Conrad had defeated, in 1140, Duke Guelf VI in the battle of Weinsberg, the city of Weinsberg was besieged and soon reduced to the necessity of surrendering. The men were doomed to die. Upon this the women implored Conrad to allow them, *at least*, to take away so much of their treasures as each could carry on her back. The request was granted; but when the appointed hour of their departure arrived, a long procession of women appeared, each carrying her husband on her back. Mark Twain, in his "Tramp Abroad," locates this at the city of Heilbrunn. Lieber's *Hermeneutics*, pp. 80 and 84.

PAGE 251—Sec. 282.—Mr. Hall puts this rule in this way: "When the language of a treaty taken in the ordinary meaning of the words, yields a plain and reasonable sense, it must

be taken as intended to be read in that sense, subject to the qualifications, that any words which may have a customary meaning in treaties, different from their common signification, must be understood to have that meaning, and that a sense cannot be adopted which leads to an absurdity, or to incompatibility of the contract with an accepted fundamental principle of law." Hall's In. Law, sec. 111.

PAGE 255—Sec. 287.—A fine illustration of this rule is found in an Act passed by the Virginia Legislature, (Acts '81-2, chap. 7, p. 10) which was denominated an "Act to prevent frauds upon the commonwealth and the holders of her securities." That act, after setting forth that forged and spurious coupons were in existence, and that genuine coupons which had once been paid were re-issued, concluded in its preamble with these reasons for the passage of the act, "Therefore for the purpose of protecting the rights of the said bondholders, and of enforcing the said contract between them and the commonwealth, preventing fraud in the revenue of the same, Be it enacted," &c. Although it was gravely suspected, by not a few, that the object of the law was to obstruct the bondholder in the collection of his coupons, it was not allowable to put this interpretation upon it. See *Antoni vs. Greenhow*, 107 U. S., p. 769.

PAGE 257—Sec. 290.—Three ways are mentioned how under this rule you ascertain the meaning of the promise. 1. We endeavor to ascertain what the promisor had in his mind. 2. What his words indicate as being the understanding of both parties to the contract, and, 3. The nature of the things about which the contract was made and the circumstances under which it was made.

It is a question to be put in the sense subject to the qualifications that any words which may have a customary meaning is treated differently from their common or signification, that is understood to mean that meaning and that a sense cannot be adopted which would make it an absurdity, or to be incompatible with the contract which is adopted fundamental principle of law. *State v. Lamm*, 107 U. S. 139.

Page 255—Sec. 290.—An illustration of this rule is found in an act passed by the Virginia Legislature, "Acts relating to the currency of the Commonwealth, and the holders of her revenue bonds upon the commonwealth." That act, after setting forth that forged and spurious coupons were in existence, and that genuine coupons which had once been paid were re-issued, concluded in its preamble with these reasons for the passage of the act, "Therefore for the purpose of protecting the rights of the said bondholders, and of enforcing the said contract between them and the commonwealth, preventing fraud in the revenue of the same, Be it enacted," &c. Although it was gravely suspected by not a few, that the object of the law was to obstruct the bondholder in the collection of his coupons, it was not allowable to put this interpretation upon it. See *Antoni vs. Greenhow*, 107 U. S., p. 769.

Page 257—Sec. 290.—Three ways are mentioned how to ascertain the meaning of the promise. We endeavor to ascertain what the promisee intended in his mind. 2. What his words indicate as being the meaning of the promise. 3. The circumstances of the time and place of the making of the contract, and, 3. The circumstances of the time and place of the making of the contract.



PAGE 259—Sec. 292.—You might note here also the apt illustration given by Blackstone, vol. 1, p. 60, side.

PAGE 276—Sec. 329.—The principles adopted in the settlement of disputes between nations by arbitration are pretty much the same as they are in cases of arbitration between individuals. These are the grounds which ordinarily entitle either party to contest the validity and binding force of an award.

1. If one of the arbitrators has not acted in good faith or if their decision is tainted with fraud.
2. If any of the stipulations of the articles of submission have not been complied with as to method of procedure, time and place of meeting, or if the award has not been rendered within the time specified in said articles.
3. If the arbitrators exceed their jurisdiction or go outside of the case submitted in their decision.

There is a very strong effort now being made to have this adopted by nations as the mode of settlement of disputes. In England, on the foundation of Dr. Whewell, at the University of Cambridge, lectures are delivered having this end in view. But in the lectures delivered there on this foundation by Sir Henry S. Maine in Michaelmas Term 1887, it is admitted that there are difficulties about the adoption of this mode of settling disputes between nations, that do not exist in the case of such mode of settlement between individuals, and whilst this mode will, probably, be resorted to more frequently in the future than it has been in the past, there is not much probability of its being adopted as an obligatory mode of settling disputes between nations. The difficulties between the United States and Great Britain, growing out of the destruc-

tion done to the United States shipping by Confederate privateers during the late civil war, were settled in that way, and there is a probability that the difficulties between the same powers, growing out of the seal fishery, will be settled in the same way. It would certainly be a great step in the direction of permanent peace between the nations of the earth, if this mode could, by common consent of nations, be adopted as part of the code of international law.

PAGE 278—Sec. 330.—The congresses of note, since those mentioned by Vattel, are the Congress of Laybach in 1820, the Congress of Verona in 1822, and the Congress of Paris in 1856. The powers at the first were Austria, Russia, and Prussia. The powers at the second were these, with France added, and this was the Congress which gave occasion for the declaration, styled the Monroe doctrine. The powers engaged in the last were Austria, France, Great Britain, Russia, Sardinia, Turkey and Prussia.

PAGE 282—Sec. 341.—Retorsion consists in the application of the same rule of conduct in our relations with another state as is applied by that state in its relations with us, and is, generally, applied to cases of the violation of mere comity, or of the imperfect obligations of nations. It seems only to differ from retaliation in that the latter has reference rather to vindictive measures, and is designated by Mr. Wheaton vindictive retorsion. Retaliation is now only resorted to in war times, when one nation imposes some punishment or indignity on prisoners. Wheaton's Int'l Law, sec. 290. Hall's Int. Law, sec. 120.

PAGE 284—Sec. 346.—Reprisals consist in seizing the property of another nation by way of security until it shall listen

to the just claim of the nation seizing it, and are used to enforce the perfect obligation of nations. They are divided by Mr. Wheaton into negative, positive, general and special. Negative, when a state refuses to fulfill a perfect obligation, or to permit another nation to enjoy a right which it claims. Under this head may be ranked our late Fishing Rights Bill, passed in the 2nd session of 49th Congress. That bill provided, amongst other things, "that if our fishing vessels were denied their rights, the President might deny to British vessels entrance to our ports, and entry into any place of fresh or salt fish coming from Canada." Positive—in seizing the persons and effects belonging to other nations, in order to obtain satisfaction. General, when a state, supposing it has received injury from another nation, delivers commissions to its officers and subjects to take the persons and property belonging to another nation wherever found, and this is, generally, the first step in war. Special, when letters of reprisal are granted in time of peace to *individuals* of the nation who have suffered injury from the government or subjects of another nation. This last mode of reprisal is reprobated and discountenanced by nations generally now, and is not in conformity with any amicable settlement now practiced by them. It may be said that it does not exist as part of international law. Reprisals are, generally, only justifiable when there has been an absolute denial of justice, so intentional and deliberate on the part of the offending nation as to constitute a just cause of war. The form of reprisal, most commonly used in modern times, is the laying of an embargo on such ships of the offending state as may be in the ports of the state making reprisal, or is the seizure of the ships of such offending party at sea, or the

seizure of any property of the offending party, not entrusted to the public faith, within the state making reprisal, and this property is only sequestered. If the difficulty is settled the property is restored; if war results, it is confiscated. Wheaton's Int. Law, sec. 291. Davis' Int. Law, p. 196. Hall's Int. Law, sec. 120.

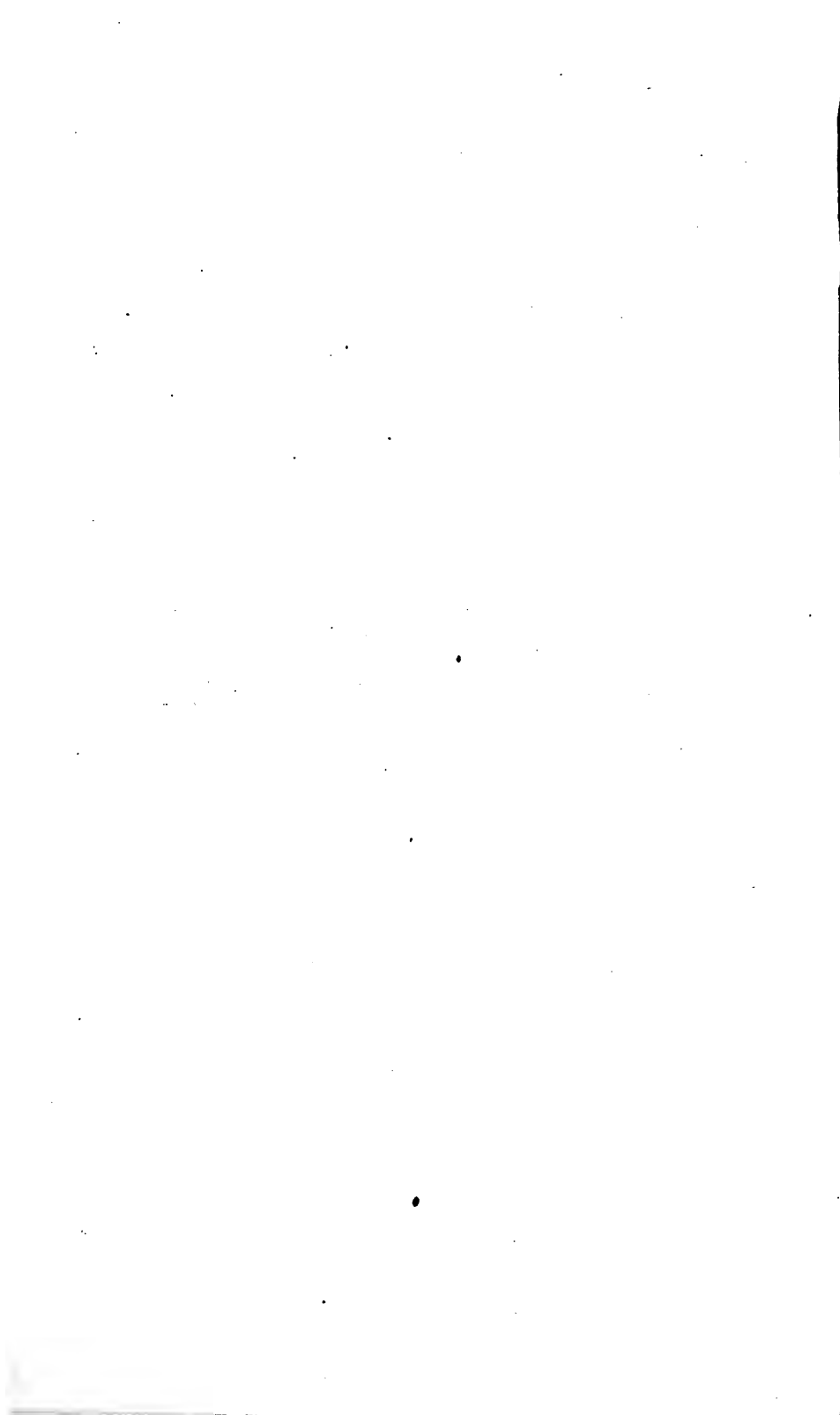
According to present usage, letters of marque only apply to cases of general reprisal and to the authorization in such cases given to private armed trading vessels to make captures of property of the enemy when war has commenced. The letters spoken of by Vattel would be letters of *reprisal* or of *marque and reprisal*. The seizure of property in cases where letters of marque are issued is now confined to commercial property. If the private vessel receiving this authorization in war is fitted out and employed solely as a cruiser she is called a privateer.

PAGE 287—Sec. 351.—This practice is opposed to unquestioned modern international law.

PAGE 289—Sec. 354.—Reprisals are rarely resorted to now; and since the end of the seventeenth century but few examples have occurred of reprisals made in time of peace; and now, in many instances, they are, by treaty, restricted to cases of the denial or delay of justice. Ordinarily they are the first step in war. There is a mode not mentioned by Vattel which has been frequently resorted to in modern times for the purpose of using constraint short of war, and that is what is known as a pacific blockade. To make this legal it must, however, be confined in its effects to the blockaded country. In this way it may sometimes be used effectively, as a measure of international police, when hostile action would be inappropriate and

no action less stringent would avail. The first instance was when Greece was blockaded in 1827 by the English. The Tagus was blockaded by France in 1831, New Granada by England in 1836, Mexico by France in 1838, The La Plata by France from 1838 to 1840 and from 1845 to 1848 by France and England, the Greek ports in 1850 by England, port of Formosa by France in 1884 and Greece in 1886 by Great Britain, Austria, Germany, Italy and Russia. Hall's Int. Law, sec. 121.

BOOK THREE.



BOOK THREE.

PAGE 291—Sec. 3.—If we turn to the Constitution of the United State, (art. I, sec. viii, sub. sec. 11) we will find that by that, Congress is the war making power, but in the Prize cases, (2 Black. 668) a majority of the Supreme Court of the United States decided that the President, if a war be made by the invasion of a foreign nation or be commenced by a portion of the people of the United States during the recess of Congress, is not only authorized but bound to resist force by force, and, in doing this, may really declare war. It would not seem to follow that because he is bound to resist force by force he would be authorized, in the very teeth of the express provisions of the constitution, to declare war. The facts in the Prize cases were these. On the 15th and 19th of April, 1861, President Lincoln had declared that war existed and his intention to blockade the ports of certain states, Virginia being one of them. On the 27th and 30th of April, 1861, he declared that a blockade *de facto* actually existed. On the 10th of July, 1861, the Amy Warwick, owned by citizens of Richmond, was captured off Cape Henry, on her way from Rio to Richmond, with a cargo of coffee: on the 17th of May, 1861, the Crenshaw, owned by citizens of Richmond, was captured at the mouth of James River, bound for Liverpool with a cargo of tobacco: on the 20th of May, 1861, the Hiawatha, a

British barque, was captured in Hampton Roads, on her voyage from Richmond to Liverpool, with a cargo of tobacco, and, on the 23d of June, 1861, Louisiana being also one of the states included, The *Brillante*, a Mexican schooner, was captured in Biloxi Bay, on her voyage from New Orleans, with a cargo of flour. At the dates of these captures the Congress of the United States had not declared war.

PAGE 294—Sec. 9.—According to this usage and practice the United States keeps a regular army which consisted in 1887 of 27,489 men and officers, besides an immense host of pensioners. By the laws of the United States, "The Vice-President of the United States, the officers, judicial and executive of the government of the United States: the members of both Houses of Congress and their respective officers: all custom house officers with their clerks: all postmasters and persons employed in the transportation of the mails: all ferry-men employed at any ferry on post roads: all inspectors of exports: all artificers and workmen employed in the arsenals and armories of the United States: all pilots: all mariners actually employed in the sea service of any citizen or merchant within the United States: and all persons who now are or may hereafter be exempted by the laws of the respective states, shall be exempted from militia duty" and also all persons under the age of 18 and over the age 45 years.

PAGE 295—Sec. 11.—To prevent private persons from being burthened with providing quarters for soldiers in time of peace the Constitution of the United States, (3d Amendment) provides that "no soldier shall, in time of peace, be quartered in any house without the consent of the owner."

PAGE 295—Sec. 15.—In addition to measures which may

be used by the United States in her own country to prevent the enlistment of her citizens in foreign wars, by section 4090 Revised Statutes United States, her ministers abroad may issue all manner of writs to prevent her citizens, who may be in the countries where they are, from enlisting in the military or naval service of such country to make war upon any foreign power with which the United States are at peace. The principle of preventing the enlistment of her men within her dominions for the service of a belligerent is now fully recognized as a duty incumbent upon a nation. Hall's Intl. Law, sec. 218.

PAGE 312—Sec. 48.—Out of the desire of holding the political balance in equilibrium mentioned in the text, has grown what is known now as the "Primacy of the Great Powers." It dates its permanent existence from the coalition formed against Napoleon, and, chiefly, to the treaty of Chaumont which was drawn up under the influence of Lord Castlereagh and signed March 1st, 1814. The signatory powers were then England, Russia, Austria and Prussia. On the 15th of November, 1818, France, under Louis XVIII, by invitation joined it and, by invitation, Italy joined in 1867. This alliance or concert exists as a sort of International Court of Appeals, though no form of procedure is prescribed and there is no settled code determining the extent or character of its jurisdiction. It claims to exercise unquestioned and absolute control over certain questions, whilst it claims none over others which would seem to be embraced in its purposes. Thus, since 1856, all the arrangements necessitated by the gradual break up of Turkey, and the political aspirations of its subject Christian races have been decided by this concert;

but they did not claim to revise the conditions of peace between Prussia and Austria in 1866, or between Germany and France in 1871. This concert seems to have an authority superior to that of any of the other states, but how and when they will choose to exercise it, seems to be a matter of discretion with them, and dependent upon the circumstances of each particular case. No mode is provided to carry into execution their determinations, and yet, when a determination is reached, it seems, by common consent, to be regarded as entitled to obedience, and means are, generally, found to make the decision respected.

PAGE 313—Sec. 50.—As an illustration of the necessity mentioned here, might be noted the difference between the armies of the continental powers and those of the United States and Great Britain. The following are given as the numbers in the year 1888: France 541,472, Germany 487,703, Russia 871,764, Austria 271,566, Italy 879,090, the United States 27,489, Great Britain 149,667.

PAGE 315—Sec. 51.—The latest instances of a declaration of war by heralds were in 1635, when Louis XIII sent one to Brussels to declare war against Spain, and in 1657, when Sweden declared war against Denmark, by a herald sent to Copenhagen.

PAGE 316—Sec. 56.—Sir Robert Phillimore says that the statement made here by Vattel that, "In the last treaty of Aix La-Chapelle between France and Spain on the one side, and England on the other, it was agreed that all the prizes, taken before the declaration of war, should be restored," is one of extraordinary inaccuracy. The language used in Article IV of the treaty on this subject was, "and all the ships of war

as well as merchant vessels, with all their equipages and cargoes that shall have been taken *since* the expiration of the terms agreed upon for the cessation of hostilities at sea," &c., "shall be restored." The war in this case had subsisted eight months before the declaration was made, and yet no mention is made that prizes taken before that date were placed upon any different footing from prizes taken afterwards, and so this illustration is, instead of being one showing the necessity for a publication of the declaration of war, exactly the opposite. See Phillimore's Int'l Law, vol. 3, pp. 394, 395.

PAGE 318—Sec. 63.—The course mentioned by Vattel is, ordinarily, pursued, and between nations is sometimes regulated by treaty stipulations, but it is not a matter of strict right, that subjects of the state, against which war has been declared, are permitted to remain or are given time for the settlement of their affairs before leaving. In 1870 France, in the war between herself and Germany, rescinded the permission, which she had given before, to German subjects to remain, and expelled them from the department of the Seine, and required them to either leave France or to retire south of the Loire. Whilst this requirement was regarded as a harsh one, it was not regarded as opposed to the strict principles of international law. When permission is given to remain they are placed on the footing of other foreigners in that country, except that they cannot carry on a direct trade in their own, or other enemy vessels with the enemy country. In the treaty between England and the United States in 1795, it was stipulated that merchant, and other enemy subjects, shall have the privilege of remaining or continuing their trade, so long as they behave peacefully and commit no offence against the

law; and, in case their conduct should render them suspected, and the respective governments should think proper to order them to remove, the term of twelve months from the publication of the order shall be allowed them for that purpose.

PAGE 320—Sec. 68.—Whilst it is not regarded as absolutely necessary, according to modern international law, to make a public and formal declaration of war, yet it is customary, when all efforts have failed, at a peaceable adjustment, to cause diplomatic intercourse to cease, withdraw ministers, to mobilize the military and naval forces and place them upon a war footing, and, then, to make known, in some public way, for the benefit of its own subjects and of neutrals, its intention to commence hostilities. The Constitution of the United States, clearly contemplates that some act of this character should take place, as it empowers Congress expressly to declare war. In this country this notice is given by resolution adopted by that body before hostilities commence sometimes, but on other occasions it is done after they have actually commenced. It is certainly better to give public notice in some way of the intention to commence hostilities, not for the benefit of the enemy, but that their own subjects and neutrals may know how to regulate their conduct. Phillimore's Int. Law, vol. 3, chap. 5. Davis' Int. Law, p. 204. Hall's Int. Law, sec. 123.

PAGE 321—Sec. 70.—Two theories are advocated in regard to the relation which the subjects of a state bear to their enemy state in war. One is that they are in one respect private persons, with all the rights of person and property that they are entitled to, independent of their relation to their state, and without regard to their connection with it, and, in another respect, they are members of their state, from whom it derives

its means of carrying on war, and whom it employs as its agents, and, consequently, those who advocate this theory maintain that the individual is only an enemy whilst *actually fighting* for his country, whilst in the *service* of the state, or when contributing to enable it to sustain hostilities, and that *outside* of these conditions, neither is his person or property, the person or property of an enemy. The other theory is the one stated by Vattel, and the weight of authority is in favor of the latter. The latter is, certainly, the accepted doctrine in the United States. For a full discussion of these theories see Hall's Int'l Law, sec. 18.

PAGE 322—Sec. 77.—The Supreme Court of the United States in the case of *Brown vs. United States* (8 Cranch 110) decided, unequivocally, that by the law of nations the right exists to seize and confiscate any property of an enemy found in this country on the happening of war, but some legislative act must be passed to authorize its confiscation; and all the American commentators on international law agree with this decision. In fact, it is said by the court, in this case, that no jurist of reputation can be found who has denied the right of confiscation of enemy's debts. And yet, whilst the law is so stated by them, the modern rule, which, from constant usage, may be regarded as almost international law is, that the property of the enemy found within the territory of the belligerent state, or debts due to his subjects by the government or individuals, at the commencement of hostilities, are not liable to be seized and confiscated by the laws of war. Earl Russell, in a dispatch of 6th December, 1861, to the British consul at Richmond, Virginia, speaking of an act of the Confederate States Congress, confiscating the debts of enemies, says:

"Whatever may have been the abstract rule of the law of nations on this point in former times, the instances of its application in the manner contemplated by the Act of the Confederate Congress, in modern and more civilized times, are so rare, and have been so generally condemned, that it may be said to have become obsolete." And this is said to follow, as a necessary consequence of the practice adopted generally now, of either permitting the enemy's subject, who is in the state at the time of the commencement of the war, to remain, or to give him time to settle up his affairs, if required to withdraw. It is proper to state that the Confederate government drew a distinction between debts due from a subject of one belligerent to a subject of the other, and debts due from a belligerent state to subjects of the other, and, hence, there was no confiscation of public stocks and securities. Davis' Int'l Law, pp. 207, 8. Hall's Int'l Law, sec. 144.

PAGE 325—Sec. 88.—The *casus federis* is the determination when the engagements, which we have contracted in our alliances, come in force and bind us to act as required by the treaty or alliance.

PAGE 327—Sec. 95.—The doctrine stated in the text, as advocated by "some authors," is the present recognized doctrine on this point, "that whoever joins our enemy, or assists him against us with money, troops or in any other manner whatever, becomes thereby our enemy, and gives us a right to make war against him."

PAGE 327—Sec. 97.—The doctrine, stated here, is maintained by the most of the American authorities, that assistance may be given by one nation to another in war, without making the nation so assisting this belligerent the enemy of

the other belligerent, when this assistance is given in consequence of treaty obligations contracted prior to the war in which the assistance was given, but it does seem that those who combat this doctrine have the better reason, and that, *at present*, the rules of neutrality require entire abstinence from the war and impartiality of conduct towards both belligerents, to make a nation a valid neutral, whatever may be the obligations which she had entered into with one of the belligerents prior to the war; and it would be a complete answer to the claim set up by the nation, of prior obligation, that no such obligation should be entered into by any nation which expected to claim to occupy a position of neutrality. Mr. Hall says that the authors, who advocate this doctrine, stated by Vattel, can cite no later precedent in its favor than that of the Danish loan of troops to Russia in 1788; and that it is doubtful whether the facts of that case are not more against the position which they take than in its favor. Believing that the better view is, with those who claim that entire abstinence from any participation in the war, and impartiality of conduct towards both belligerents are both necessary under all circumstances to make a *bona fide* neutral, it is suggested that the following changes be made in the text of Vattel. In section 97, on page 327, in last line on that page, and in first line of page 328, strike out the words "without being obliged to it by any treaty;" in section 100, on page 329, strike out in 3rd and 4th lines of that section, the words, "if it stipulates the assistance of the whole strength of the allies," and then strike out entirely section 101. See both *pro* and *con* on this point the following authorities. Phillimore's Intl. Law, pp. 224, 225, 226, 227. Notes 145 and 215 of Dana in his edition of

Wheaton's Intl. Law, foot pages 356 and 536. Davis' Intl. Law, p. 297. Hall's Intl. Law, sec. 215. Kent's Comm., vol. 1, p. 116, side. Wheaton's Intl. Law, secs. 279 and 424. Woolsey's Intl. Law, sec. 163.

PAGE 332—Sec. 104.—In conformity with view presented in note to section 97, strike out in line twenty of this section, and line two of the second paragraph of the section, the words, "when there is no obligation to give it."

PAGE 332—Sec. 106.—Strike from this section, in the second line of it, the words, "that one not bound by treaties," and, in the eighth line from beginning of section, strike out all the residue of section after the word "contest" in that eighth line. Sir Robert Phillimore thus states the doctrine. The neutral has nothing to do with the justice or injustice of the war, and the error of Grotius, in this respect, though copied by Vattel, is, rightly, corrected by Bynkershoek and subsequent writers. Phillimore, vol. 3, p. 226.

PAGE 334—Sec. 110.—In the second paragraph of this section, lines two and three from beginning of it, strike out the words, "the sovereign or;" for, according to modern international law, it is not lawful for one neutral state to loan money or supply troops, except to fleeing troops within its territory, and then only to them as the individual subjects of a friendly state. It is a violation of neutrality for a state to open her harbors for hostile enterprises, or to permit the presence of a vessel or individual in her harbors, or within her territory, when there for hostile purposes, or to permit its subjects to prepare, or aid in preparing, any hostile expedition against a friendly power. It was upon this principle that England was held liable, by the award of the Geneva arbitrators, for dam-

age done by the Alabama and other Confederate cruisers. The custom of furnishing troops to belligerents, or permitting them to enlist troops within neutral territory, as formerly practiced, is not now tolerated, but is regarded as a violation of neutrality.* Since the Geneva arbitration between Great Britain and United States this doctrine, so far as they could settle it, is embodied in these three rules which were then adopted and, which, in the treaty of Washington in 1871, were agreed by them to be observed in the future, and it was also agreed that they would bring them to the knowledge of other maritime nations and invite them to accede to them.

First. To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel, which it has reasonable ground to believe, is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or to carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

Secondly. Not to permit or suffer either belligerent to make use of its ports or waters, as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies, or arms, or the recruitment of men.

Thirdly. To exercise due diligence in its own ports and waters, and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations.

In accordance with these principles it was that the *Itata*, a vessel belonging to the Chilean insurgents was refused to be permitted to provide herself with arms in one of our ports.

The pursuit of this vessel, however, beyond the marine league and on the high seas, raises another question of importance. Prior to the adoption of these rules, it seemed to be settled law that it was not permissible for a non-belligerent state to assume control over persons on the high seas, other than pirates, or persons on board its own ships, but it is stated to follow, as a necessary consequence of the contention at Geneva by the United States, that the adoption of that principle *would* give a state such a right. The question then is whether these rules have not modified this principle. It may be, however, that the right to follow it on the high seas was based upon the fact of her violation of the order of an admiralty court in whose custody the vessel seems to have been at the time. As the vessel was surrendered, and as she is now before the court, it is presumed that we will have a decision upon this point.

The loan of money referred to above as a violation of neutrality, has alone reference to a loan of money by the neutral *government*, and it is no violation of neutrality for the subjects of the neutral state to loan money to the belligerent government or her subjects. The true doctrine on this point was stated by Mr. Webster in 1842. He said "as to advances and loans made by the individuals to the government of Texas or its citizens, the Mexican Government hardly needs to be informed that there is nothing unlawful in that, and that these are things which no government undertakes to restrain." The same principle formerly applied to the sale of armed vessels, arms, and munitions of war by the subjects of a neutral state, and these were regarded merely as commercial dealings with a belligerent, in which the only risk ran was their capture and

confiscation as contraband of war. In the case of the *Santisima Trinidad*, 7 Wheat. 341, the Supreme Court of the United States, said "there is nothing in our laws, or in the law of nations that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale, and which only exposes the person engaged in it to the penalty of confiscation." This principle, so far as armed vessels are concerned, is clearly overruled by the rules agreed upon, as above stated by the treaty of Washington in 1871. Mr. Jefferson, in his letter to Mr. Hammond, of date May 15, 1793, says: "Our citizens have always been free to make, vend, and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings, the only means, perhaps, of their subsistence, because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice. The law of nations, therefore, respecting the rights of those at peace, does not require from them such an internal derangement of their occupations." Again, in 1855, President Pierce, speaking on articles contraband of war, said that the laws of the United States do not forbid their citizens to sell to either of the belligerent powers articles contraband of war, or take munitions of war or soldiers on board their private ships for transportation; and although in so doing the individual citizen exposes his property or person to some of the hazards of war, his acts do not involve any breach of *national* neutrality, nor of themselves implicate the government. And yet, notwithstanding these statements, the disposition seems now to be to regard such sales as a violation of neutrality, if made upon a very large scale. In 1870 Count Bismarck accused

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the British Government of not acting according to the strict principles of neutrality, taken by that government, in permitting large contracts to be entered into by the French Government with English houses, for the supply of arms and ammunition. Phillimore's Int'l Law, vol. 3, pp. 245 and 247. Wheaton's Int'l Law, note 215 of Dana to sec. 439. Hall's Int'l Law, sec. 218. Davis' Int'l Law, p. 297.

PAGE 337—Sec. 112.—Provisions, according to Vattel, are what are called occasional contraband, and the weight of American authority is certainly in favor of that view, though that doctrine cannot be considered as firmly settled generally. With provisions may also be classed money, and unwrought metals, and in general clothing and its materials. The United States, in the war between it and the Confederate States, regarded cotton as contraband of war, when it took the place of money, and it was said that cotton was in fact, to the Confederacy, as much munitions of war as powder and ball, for it furnished the chief means of obtaining these indispensables of warfare. In the case of the *Peterhoff*, 5 Wall. 58, it is said that a strictly accurate and satisfactory classification of contraband goods is, perhaps, impracticable but that which is best supported, seems to be this—to divide merchandize into three classes: The first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war. This class, if destined to a belligerent country, or places occupied by the army or navy of a belligerent, is always contraband. The second, of articles which may be and are used for purposes of war or peace, according to circumstances. This class is contraband only when actually destined to the military or naval use of a belligerent. The third of articles

exclusively used for peaceful purposes, which are never contraband. It may be observed that no article of merchandise is contraband of war so long as it remains in neutral territory, or is found on the high seas with a *bona fide* neutral destination, and the destination of the goods rather than the ship is to be looked to. In case of provisions or occasional contraband it is, sometimes, the practice to subject them to what is known as the doctrine of pre-emption, which means that the captor may take them as a purchaser at their mercantile value with a reasonable profit, which is, generally, calculated at 10 per cent. on the amount.

In this connection it may be well to notice what is known as the doctrine of continuous voyages. This occurs where the goods are not ostensibly destined for the port of the enemy, but for a neutral port; there is, however, a suspicion that this is only a pretence, and that whilst the vessel will touch at that port, or perhaps unload her cargo there, the ultimate and real destination is to the port of the enemy. In such cases the English courts condemn the property, but they are careful not to condemn it until what they conceive to be the hostile act is irrevocably entered upon; the cargo is confiscated only when captured on its voyage from the port of colorable importation to the enemy country, whilst the American doctrine is that parol evidence may be permitted of their ultimate destination and the cargo condemned whilst on its voyage from one neutral port to another neutral port. For the American doctrine on this point see *The Bermuda*, 3 Wall. 514. See on the whole question *The Commencen*, 1 Wheat. 382. Phillimore's Intern. Law, vol. 2, sec. 131. Wheaton's Intl. Law, secs. 502, 504. *The Springbok*, 5 Wall. 1. Hall's Intl. Law, sec. 247. Wharton's Digest, vol. 3, sec. 373.

PAGE 337—Sec. 113.—Not only are the contraband goods confiscated, but, in some cases, the ship is also confiscated. It is said to be confiscated in the following cases: 1. When the owner of the ship owns any part of the contraband cargo. 2. When the greater part of the cargo is contraband. 3. When deceit is attempted by the use of false papers, or when a false destination is claimed. 4. When carried in violation of treaty stipulations. Davis' Intl. Law, p. 354.

PAGE 338—Sec. 114.—And this search can only, legally, be made by two kinds of vessels: 1. The regular navy—the public ships of the State, and, 2. By privateers. The mode of summoning the neutral to submit to search, is by the firing of a cannon shot on the part of a belligerent—called an affirming gun, but this, though usual, is not regarded as absolutely necessary.

The war of 1812 in the United States was fought, not in resistance of this right of search, for this is conceded to be lawful, but in resistance of the right claimed by the English government of searching on vessels for subjects or seamen. This question, though virtually settled by the abandonment of the practice, was never formally and definitely settled till the passage of the Act of 1870, 33 Vict., ch. 147. That Act provides that a British subject on becoming naturalized shall lose his British national character. By international law it is now, however, held that one State has not a right to take even its own subjects out of a merchant ship on the high seas, belonging to another State with which it is at peace. Phillimore's Intl. Law, vol. 2, p. 533, 537, 543. Hall's Intl. Law, sec. 273.

PAGE 339—Sec. 115.—The modern practice of prize courts is, whilst it seizes the enemy's goods on board a neutral ves-

sel, to pay full freight to the neutral vessel, if its conduct has been perfectly fair, the capture of the goods being regarded as equivalent to delivery. If the conduct is not fair then no freight is paid. Phillimore's Int. Law, sec. 499, vol. 3. Hall's Intl. Law, sec. 247.

PAGE 339, Sec. 116.—In the case of neutral goods found on an enemy's ship if they are carried to their port of destination the captor is entitled to freight. If they are not, no freight is due. This principle is said by some only to apply to merchant ships, their contention being that hostile ships, with whatever goods on board, are to be regarded as prizes of war. The American courts, however, oppose this view and are in favor of the neutral using the armed vessels of the belligerent, and in the cases of the *Atlanta* and the *Nereide*, (9 Cranch 388, 3 Wheat. 415) have so decided. In the last mentioned case, Mr. Justice Story dissented, and held to the English view, which is that the goods are lawful prize of war. Sir Robert Phillimore thinks that Story and Scott together settle the case against the right of neutrals to ship goods on board of the armed vessels of a belligerent, so far as international law is concerned, though conceding that Story does not represent American Prize Law. Chancellor Kent regards the doctrine as well settled here that such goods are not lawful prize of war. 1 Kent's Comm., side p. 132. Phillimore's Intl. Law, vol. 3, sec. 341.

The principle with regard to enemy's goods on board of neutral ships and with regard to neutral goods on board an enemy's ship, stated by Vattel, is the American doctrine now; but according to the declarations made at Paris in 1856, which have been acceded to by all the Christian powers of

Europe, except Spain, and by all on this side the Atlantic, except the United States and Mexico, free ships make free goods. These declarations are:

1. Privateering is and remains abolished.
2. The neutral ship covers enemy's goods, with the exception of contraband of war.
3. Neutral goods, with the exception of contraband of war, are not liable to capture under an enemy's flag.
4. Blockades in order to be binding must be effective.

Mr. Marcy for the United States in 1856 declined to accede to these declarations unless it was agreed that private property on the high seas, except contraband of war, should not be liable to capture at all. This is what is styled the Marcy amendment. As soon as Mr. Buchanan qualified he gave notice to our ministers not to press this Marcy amendment. Mr. Seward, in the beginning of the late civil war, in order to get rid of the Confederate privateers, directed our ministers in France and England to agree to these declarations, but, being informed by both these countries that, as they had recognized the Confederate States as belligerents, the accession to these declarations would not affect their rights, he withdrew the proposition, and so this doctrine is not the doctrine of the United States.

PAGE 339—Sec. 117.—Blockade consists in the interception, by a belligerent, of access to territory or to a place which is in the possession of his enemy, and denotes the obstruction of the passage properly, into or from a place on either element, but as neutrals have little to do with sieges or blockades on land, it is in modern times, more especially, applicable to naval forces preventing access by water. It does not, like siege,

indicate any intention of getting possession of the place. It may have effect in a seaport, roadstead, portion of a coast or the mouth of a river. The last is termed a commercial blockade, and if this river is the pathway to neutral territory, it cannot be blockaded. All powers agree that a blockade, in order to be valid, must be effective, and to be effective there must be the actual presence of a sufficient number of vessels to make it highly probable that a vessel seeking to enter will be captured, and these vessels must remain there unless driven away by a storm or other casualty and, when driven away by these, they must return when the storm or casualty has passed. Then notice must be given of the blockade which, in the United States, and, generally, is given both by general public proclamation and actual notice to the vessel attempting to enter by one of the blockading vessels, which last notice must be endorsed on the ship's papers which is thus warned not to attempt to enter. Although notice is usually given in this way, yet if it be established that the vessel seeking to enter had notice of the blockade in any way it will be sufficient. A vessel violates the blockade either by some positive act as entering or leaving the blockaded port, or by showing a clear intention to enter. The penalty is confiscation, and it is visited first upon the ship, and the cargo is not confiscated if it can be shown that it does not share the guilt of the ship. The penalty attaches from the time the vessel starts on her voyage from the home port until she returns to it again. The doctrine of *continuous voyages* also applies in this case, and so a vessel may be confiscated whilst sailing from one port, which is neutral, to another neutral port, according to American authority, if it can be proved by parol that her real and ultimate destination is to the blockaded port.

PAGE 343—Sec. 130.—Most of the modern authors controvert this doctrine of Vattel as to the right of a neutral to grant a passage of troops without a violation of neutrality. It is said that there has been no attempt made, since 1815, to take advantage of this right, and that the permission granted to the allies in that year, was extorted from Switzerland under circumstances which robs it of any authority as a precedent on this point. Switzerland, in 1870, denied a passage through their country to bodies of Alsatians who were enlisted for the French army, who were traveling without arms or uniforms, and it is asserted very positively that their conduct was in conformity with the present international law on this question. It is certainly a non-neutral act, for the purpose of aiding one of the belligerent parties, and must be so considered according to what has been stated to be the essentials of neutrality at the present day. In 1870 the Germans sought to use Belgium territory under a plea of humanity. After the battle of Sedan the victorious army was embarrassed by masses of wounded men whom it was difficult to remove to Germany, over the routes open to them, without impeding the operations of the German army, and they, therefore, applied to Belgium for permission to transport their wounded through her territory by railway. France strongly protested against permission being given them, and the Belgian government, after consultation with England, denied permission. The reason was that this would have been giving direct aid to Germany by relieving her railways and enabling her to use them for warlike purposes. It would seem then that, in no case, could this permission be given without a violation of the present law of neutrality. Hall's Intl. Law, sec. 219. Phillimore's Intl.

Law, secs. 152 to 154. Woolsey's Intl. Law, sec. 172. Wheat. Intl. Law, sec. 427, note 205, (Dana's ed.)

PAGE 344—Sec. 132.—Mr. Hall says that the doctrine stated by Prof. Marten, in note 160 to this section, was modified in England, or rather was supplemented, by imposing some limit to the time during which belligerent vessels may remain in a neutral port when not actually receiving repairs. The reason for this change arose out of an incident during the late war and is stated by him in this way: "In the end of 1861, the U. S. Corvette, Tuscarora, arrived in Southampton waters with the object, as it ultimately appeared, of preventing the exit of the Confederate cruiser, Nashville, which was then in dock. By keeping up steam and having slips on her cable, so that the moment the Nashville moved the Tuscarora could precede her and claim priority of sailing by moving and returning again within twenty-four hours, and by notifying and then postponing her own departure, the latter vessel attempted, and for some time was able, to blockade the Nashville within British waters. In order to guard against the repetition of such acts, it was ordered in the following January that during the continuance of hostilities any vessel of war of either belligerent entering an English port should be required to depart and to put to sea within twenty-four hours after her entrance into such port, except in case of stress of weather, or of her requiring provisions, or things necessary for the subsistence of her crew or repairs; in either of which cases the authorities of the port were ordered to require her to put to sea as soon as possible after the expiration of such period of twenty-four hours." In 1870 the same rule was laid down both by England and the United States, and so it may soon become a

permanent supplement to the doctrine stated in note. Bernard's *Neutrality of Great Britain*, ps. 270, 273. Hall's *Intl. Law*, sec. 231. Instances occurred during the late civil war here of a violation of the principles stated in section 132. The *Chesapeake*, a Confederate vessel, was seized in 1863 by United States vessel at Nova Scotia. On demand of the British government the vessel and cargo were restored. The Confederate steamer, *Florida*, was seized in a Brazilian port and cut out out under the guns of a Brazilian corvette. For this the United States minister apologized and a frigate was sent to the port to salute the Brazilian flag.

PAGE 350, sec. 143.—The Duke of Wellington in a dispatch to Mr. Canning, of February 3, 1820, maintained the view that the garrison of a besieged place that refused to surrender could be put to the sword, but he never put it in practice, and it is believed that no such action would be tolerated at the present day. No instance of the kind has occurred since the year 1790, when the Russian government's army took Ismail by storm after a long siege and massacred, under the orders of Suwarrow, 30,000 men and 6,000 women and delivered the place up to pillage. The defence of a place is a question for the besieged alone and not for the besiegers. In the present temper of the civilized world a gallant defence would seem to merit favor rather than punishment. Hall's *Intl. Law*, sec. 129. Davis' *Intl. Law*, p. 222

PAGE 351—SEC. 144.—The following classes of persons have no claim to the treatment of prisoners of war: 1. Bands of marauders acting without the authority of the sovereign or the order of the military commander. 2. Deserters captured among the enemy's troops, and, 3. Spies, even though they

belong to the regular army. It was a question, at one time, as to how balloonists were to be treated when they were captured by the descent of their balloon into the enemy's lines, and it was decided that they were to be treated as prisoners and not as spies. Spies, it will be observed, are those who penetrate, secretly, or in disguise, or under false pretences, within the enemy's lines for the purpose of military information for the use of their army. Phillimore's Intl. Law, vol. 3, p. 164. Hall's Intl. Law, sec. 188.

PAGE 351—Sec. 147.—This seems to be the modern rule of warfare with regard to non-combatants: "Private persons remaining quiet and taking no part in the conflict, are to be unmolested." How are they to be treated when they take up arms? Are they to be treated as bands of marauders not entitled to be treated as prisoners? It was supposed, at one time, that one of two things was required to make them legal combatants, and to be entitled to be treated as such: 1st. The possession of an authority given by the sovereign, and, 2nd, some kind of uniform or designation as regular soldiers. These requirements were somewhat broken down during the Napoleonic wars, when the sovereign would, frequently, call out all the inhabitants, and Mr. Wheaton gives combatant privileges, not only to the regular forces of a nation, but to all others called out in its defence, or spontaneously defending themselves in case of urgent necessity, without any express authority for that purpose. In 1863 the United States, in its instructions to its armies in the field, say, "if the people of that portion of an invaded country, which is not yet occupied by the enemy, or of the whole country, at the approach of a hostile army, rise, under a duly authorized levy, *en masse*, to

resist the invaders, they are not treated as public enemies, and if captured are prisoners of war." It seems, from this, that, whilst no uniform or badge of soldiers is required, some authority is necessary, and that a spontaneous defence without some authority would not entitle them to combatant privileges. Hall's Int'l Law, sec. 178.

PAGE 352—Sec. 148.—By the present law no persons are made prisoners except combatants, or those persons, who are non-combatants, that are of special importance to the state—such, for instance, as the sovereign, the members of his family who are non-combatants, ministers, and high officers of the government, diplomatic agents, and, in short, all those who, for special reasons, may be of importance to the government. Phillimore's Int'l Law, vol. 3, sec. 95. Hall's Int'l Law, sec. 131.

PAGE 355—Sec. 151.—In regard to the cases mentioned as illustrations of the circumstances under which prisoners may be treated harshly, Burke says that they are instances "at which morality is perplexed, reason is staggered, and from which affrighted nature recoils." Sir Robert Phillimore says of them: "At least it may be said that the clearest evidence of the absolute necessity of self-preservation is required to palliate them. The prisoner who has yielded under conditions cannot be injured so long as he fulfills his part of the conditions. The prisoner who has made no such conditions may be subject to all necessary restraint, proportioned, of course, to his readiness to submit or his intention to escape. But surely the brave, the wise, and the humane will join in preferring the conduct of Charles XII, when, after the battle of Narva, he disarmed and set at liberty the prisoners who en-

cumbered him, to the conduct of his adversary, who, after the battle of Pultowa, sent the prisoners, whose prowess he had experienced and dreaded, into the wilds of Siberia." Phillimore's *Int'l Law*, vol. 3, p. 163. Burke's *Works*, vol. iv, p. 127.

PAGE 357—Sec. 153.—The present usage of the exchange of prisoners was not firmly established in Europe until some time in the course of the seventeenth century, and even now, it is not obligatory upon nations, and they may, if they choose, refuse to exchange and leave their prisoners taken by their enemy in his hands. Although the ransom of prisoners is now much discountenanced, it cannot be said to be unlawful. Phillimore, vol. 3, p. 164. Hall's *Int'l Law*, sec. 134.

PAGE 357—Sec. 154.—Now prisoners, whilst detained, are fed and clothed by the captor's government, and they are entitled, in addition to proper food and clothing, to medical attendance, to a reasonable allowance of fuel, quarters, bedding and camp equipage. Davis' *Int'l Law*, p. 234. By international law the status of a prisoner may be terminated in three ways: 1, By exchange, 2, By ransom, and 3, By treaty of peace at the end of the war.

PAGE 358—Sec. 155.—According to modern international law, if a soldier was to steal into the enemy's camp, penetrate to the general's tent and stab him, his conduct would be condemned. Woolsey's *Intl. Law*, sec. 133.

PAGE 361—Sec. 156.—No rule can certainly be laid down with regard to the destructiveness of weapons allowable in war, outside of the rule that they must not be poisoned weapons. It is said that though hot shot, chain shot and bar shot are, practically, obsolete on account of the general use of rifled guns, and because they would be ineffective against iron

clads, yet, although there is some difference on this point, the weight of authority seems to justify their use when they can be made effective. The admissibility of the use of destructive weapons seems to depend rather upon the character of the wound or injury, caused by its use, than upon its destructibility. If the wound produced by it causes unnecessary suffering or injury, it is prohibited. At the International Conference which met at St. Petersburg on the 11th of December 1868, on this point there was made the following declaration which was agreed to by Great Britain, Austria, Bavaria, Belgium, Denmark, France, Greece, Italy, Netherlands, Persia, Portugal, Prussia, Russia, Sweden, Norway, Switzerland, Turkey and Wurtemberg: "The contracting parties engage mutually to renounce, in case of war among themselves, the employment by their military or naval troops, of any projectile of a weight below 400 grammes, (12 ounces avoirdupois, or $\frac{3}{4}$ of a pound), which is either explosive or charged with fulminating or inflammable substances." It is also said that the use of guns loaded with nails or bits of iron are prohibited. This declaration of the powers mentioned above, it is supposed, will receive the general assent of civilized nations. Phillimore's Intl. Law, vol. 3, sec. 95. Hall's Intl. Law, sec. 185. Davis' Intl. Law, p. 224. Wheaton's Intl. Law, sec. 343. Dana's note 166.

PAGE 365—Sec. 164.—Booty usually means such public property as is susceptible of capture in war, and such private property as is susceptible of direct military use. Such are arms, ammunition, military stores of all kinds, cloths or clothing suitable for uniforms, shoes, leather, blankets, medicines, food and forage supplies of all kinds. This term is applicable

to seizures upon land. Hall's Intl. Law, sec. 142. Davis' Intl. Law, pp. 230, 231. The government of the United States appropriates such property to its own use.

PAGE 368—Sec. 168.—Mr. Hall says that the cases controlling the question of how far devastation and destruction, in an enemy's country, are admissible, may be divided into three classes or groups, and that by an examination of these the doctrine on this subject, at present, may be learned. To the first group belong those cases in which destruction is a necessary concomitant of ordinary military action, as when houses are razed or trees cut down to strengthen a defensive position, when the suburbs of a fortified town are demolished to facilitate the attack or defense of a place, or when a village is fired to cover the retreat of an army. In these cases devastation is always permitted. To the second group belong those cases where no military end is served, as when churches or public buildings, ~~not~~ ~~militarily~~ ~~used~~, and so situated or marked that they can be distinguished, are subjected to bombardment in common with the houses of a besieged town. In such cases destruction is always illegitimate. To the third group belong those cases where destruction or devastation is really necessary for the preservation of the force. In these cases it is justifiable; but where the destruction is extensive in scale and lasting in effect, modern opinion demands that the necessity should be extreme and patent. It would seem that when no military end is served, destruction of property, either public or private, is condemned. It would certainly require a strong case to justify a destruction so complete that a crow, flying over the country, would find it necessary to carry his haversack with him. Hall's Intl. Law, sec. 186.

PAGE 368—Sec. 169.—The bombarding of towns is a cruel practice and does not often result in any advantage to the besieging party and, although, perhaps, sanctioned by usage, is not often resorted to in modern times. During the late Franco Prussian war it was resorted to and, hence, may be regarded as a legitimate mode of warfare at present. It is customary to give notice to the inhabitants in order that they may make provision to retire to some place of safety, but the laws of war do not seem to require this notice. In 1870 the bombardment of Paris was begun without any official notice from the Prussian army. On being remonstrated with in regard to this, Count Bismarck answered that there was no necessity, according to the law, to give notice. Hall's Intl. Law, secs. 128, 186. Davis' Intl Law, p. 216.

PAGE 369—Sec. 173.—This may be said to be the rule, in modern warfare with regard to private property. The property, moveable and immoveable, of private persons, except booty, in an invaded country, is to remain uninjured. If the wants of the hostile army require, it may be taken, by authorized persons, at a fair value, and marauding should be checked by discipline and penalties. And this rule has, by the modern usage of nations, now acquired the force of law.

PAGE 373—Sec. 178. It would be well to limit the doctrine with regard to the lawfulness of stratagems and artifices stated by Vattel. By the custom of war, in order that the contending forces may carry on intercourse with each other, and that certain things associated with an army may be sometimes exempt from liability, it has been agreed that for this purpose certain acts and signs shall have a specific meaning. Where this is the case it is not lawful to do these acts or use

these signs for the purposes of deceiving an enemy. There is another limitation. When the enemy's uniform is used for deceit or the enemy's flag is used, by a vessel, for that purpose, some conspicuous mark must be put on in the first case by which they can be recognized, before attacking, and, in the last case, before firing with shot or shell their own flag must be hoisted. Phillimore's Intl. Law, vol. 3, p. 155. Hall's Intl. Law, sec. 187.

PAGE 385—Sec. 193.—Two rules are contended for, by which it may be determined when title, to booty which has reference to captures on land, passes to the captor. One is that it passes to him after the lapse of twenty-four hours from the taking, and the other is that it only passes when the property comes into a place so secure that the owner can have no immediate prospect of recovering it. The twenty-four hours rule seems to be the best, as that will rid the question of complications which might arise under the other rule.

With regard to prize, which has reference to captures on water or on sea, three rules have been contended for: 1st, The twenty-four hours rule; 2, The rule of pernoctation, according to which the prize must be in the possession of the captor from sun to sun, and, 3, The rule of cessation of resistance, by which the title is held to pass when armed resistance ceases and the flag is struck or a voluntary surrender made. This last rule is said to be the most acceptable, but it will be observed that this only passes the title as between the belligerents. In order to pass the title so that it will be good, under all circumstances, against the original owner it must be carried into a prize court of lawful jurisdiction, condemned and sold under its decree. Until that is done, according to

American law, the owner has the right, if recaptured, to its restoration upon the payment of such sum as the court may award as salvage, costs and expenses. The English law gives the owner the right to restoration, at any time during the war, upon the same payments being made by him. Wheaton's Intl. Law, sec. 359, 373. Phillimore's Intl. Law, vol. 3, p. 617. Hall's Intl. Law, sec. 149. Davis' Intl. Law, ps. 261, 268.

PAGE 388—Sec. 201.—By the completed conquest of a country, where the conquering power becomes the firmly established sovereign of the country, the private property of the individuals is not affected, it is not transferred to the conquering state, but still belongs to the individuals, except so far as the title may have been affected during the existence of the war. The former body politic ceases to exist and the people of the conquered state owe allegiance to the conqueror in the absence of any treaty stipulations otherwise. The municipal private code of the conquered state is supposed to exist by the consent of the conqueror until displaced by new laws of his own. The public property of the conquered state, of every character, becomes the property of the conqueror, and he becomes bound to pay its debts.

This is not the case where conquest is not completed, and where it may be merely called military occupation. Formerly the occupant's control over the persons and property of the state so occupied was regarded as absolute as that of the completed conqueror. Now, in case of military occupation merely, the occupant is supposed to have only the control of person and property that is required for the prosecution of the war and for his safety and success. This occupation sus-

pends the operation of the laws which demand obedience of the subjects to their former sovereign and the occupant administers the laws by his own officers, so far as it may be necessary. He takes such steps as may be necessary to prevent the resources of the country from going into the hands of the former sovereign, and, for this purpose, he has the right to require the obedience of the citizens and to require them not to join the army of their own sovereign. Hall's Int'l. Law, secs. 153 to 162. U. S. vs. Rice, 4 Wheat. 246. Johnson vs. McIntosh, 8 Wheat. 543. U. S. vs. Percheman, 7 Pet. 51.

PAGE 391—Sec. 203.—Where there has not been a completed conquest the people relieved of military occupation are set at liberty. Where there is a doubt upon this question, the third state may determine the question as a fact, and act according to its determination. Hall's Int'l Law, sec. 165.

PAGE 392—Sec. 204.—Mr. Hall says that the doctrine of *post liminium* amounts to the truistic statement that property and sovereignty cannot be regarded as appropriated until their appropriation has been completed in conformity with the rules of international law. Hall's Int'l Law, sec. 162.

PAGE 393—Sec. 208.—It is said, in this section, that the right of *post liminium* does not take effect in neutral countries. That should be limited to property, for a prisoner brought into the neutral territory of a sovereign, or escaping into it, becomes free and restored to his former status, it being contrary to the principle of neutrality to permit him to remain deprived of his freedom in places under his control. He would not be free if on board a ship in neutral territory, for the ship would be regarded as the territory of its sovereign.

Phillimore's Int'l Law, vol. 3, p. 617. Kent's Comm., vol. 1, side p. 109. Hall's Int'l Law, sec. 226.

PAGE 394—Sec. 209.—The Roman doctrine mentioned here with regard to slaves is the doctrine contended for by the United States in the war of 1812. See Amer. State Papers, vol. iv., p. 117. It was the doctrine contended for by the Confederate States in the late civil war. Then the United States contended for a different doctrine; *tempora mutantur*, &c. The general emancipation of slavery deprives this doctrine of any practical effect.

PAGE 399, sec. 226.—See note, sec. 143, p. 351. Custom, as stated, interprets the general order under the declaration of war, of non-intercourse, as stated in note 179, on p. 400. It is upon this theory that interest is not payable upon debts due to or from an enemy during the existence of the war. Our late civil war was held to have commenced on the 27th of April, 1861, and to have ended on the 2nd of April, 1866. The statute of limitations is also suspended during that time. *Hanger vs. Abbott*, 6 Wall. 532. *Levy vs. Stewart*, 11 Wall. 244. *Brown vs. Hiatts*, 15 Wall. 177.

PAGE 400—Sec. 229.—The United States have sought to have foreigners, who become privateers under commission of a belligerent, declared pirates, but so far they have not succeeded in having this principle adopted. Whilst nations, generally, prevent their citizens from taking letters of marque from other belligerents, and the practice is reprobated, they have, at this time, gone no further. In 1839, France being at war with Mexico, General Baudin, commanding the French fleet, gave notice that every privateer sailing under the Mexican flag, of which the captain and two-thirds of the crew

were not Mexican subjects by birth, would be considered piratical and treated as such, but this seems to be a solitary instance.

PAGE 402—Sec. 232.—The doctrine as to damages caused by inevitable necessity has been approved in the case of *U. S. vs. Pacific R. R. Co.*, 120 U. S., p. 234.

By reference to note 183 to this section, on page 403, it will be seen that the English government prohibits the making of ransom contracts except under peculiar circumstances, when it may be allowed by the Court of Admiralty. By 27 and 28 Vict., ch. 25, the sovereign in council may permit or forbid contracts for ransom, by orders issued from time to time, and every person entering into any such contract in contravention of an order so issued may be fined to the extent of £500. The United States, on the other hand, permit contracts of ransom to be made in all cases, and this is the only case in which a valid contract can be made with the enemy during war, except where a prisoner from necessity may, for necessities, execute a negotiable instrument, and except where the trading is licensed by the government. Ransom is the repurchase by the owner of property captured as prize. This is said to be the practice in cases of that character. When a vessel is released upon ransom the commander gives a Ransom Bill, by which he contracts for himself and the owner of the vessel and cargo that a stipulated sum shall be paid by the captor. A copy of this is retained by him, and serves as a safe conduct and protection of the ship from the ships of the enemy's country or its allies, whilst the vessel ransomed pursues its course to the destination agreed upon. If she deviates she becomes liable to capture again, and, in this second

capture, the captor is entitled to her value over and above the amount of Ransom Bill. If there is no deviation she incurs no penalty, though she may not pursue the destined course. The captor also holds a copy of the Bill and usually keeps an officer of the prize as a hostage to secure the payment of the Bill. Hall's Intl. Law, sec. 151.

PAGE 410—sec. 249.—Sir Robert Phillimore does not approve of the distinctions taken in this section as to what may and may not be done. He thinks that the implied contract in this case is that the firing is to cease in order that each party may carry off their dead, and that it is unlawful to carry on any works, which the firing if it had not been intermitted would have impeded, and that the introduction of the reinforcement depends upon this question and not upon the lulling of the enemy into a want of vigilance by the armistice. So that if a party were to enter into the armistice in bad faith for the ostensible purpose of burying the dead, and, under cover of this, was to introduce the reinforcement, it would be a perfidious act. His opinion is that no equivocal act of this kind should be done. Phillimore's Intl. Law, vol. 3, sec. 118. He says of the statement made by Vattel that the army may silently file off in the rear and reach a safer position without a breach of faith, that it is impossible to justify the morality of this doctrine, the tendency of which would be to infuse that suspicion and distrust into the mind of the belligerent which would lead, in practice, to the worst horrors of war. *Ibid supra.*

PAGE 414—Sec. 264. This may be substituted for notes 184 and 185, on this page. Every species of contract, which tends to increase the resources of the enemy, made by the

Phil. 3^d ed

subjects of one belligerent during the war with the others, except ransom bills and contracts made for necessities by a prisoner, are illegal. This rule is applicable to every kind of commercial dealing or intercourse generally, except as aforesaid. Wheaton's Intl. Law, sec. 317. 1 Kent's Comm., side ps. 67, 104. Randolph on Comm. paper vol. 1, secs. 253, 485. Story on Bills, sec. 101. Story on Notes, sec. 96. Daniel on Neg. In., sec. 221. Phillimore's Intl. Law, sec. 110. Cappell vs. Hall, 7 Wall. 542. Montgomery vs. U. S., 15 Wall. 395. U. S. vs. Lapène, 17 Wall. 601. Mitchell vs. U. S. 21, Wall. 350. Desmare vs. U. S., 93 U. S. 605. Kershaw vs. Kelsey, 100 Mass. 561, 572.

The effect of war is to dissolve a partnership subsisting between citizens of nations at war, and if the person abandoning the hostile country has had his property in partnership with citizens of the enemy's country, it is his duty to dispose of and withdraw his interest in the firm. If he does not his property is liable to the consequences attaching to enemy's property. The William Bagely, 5 Wall. 377. Matthews vs. McStea, 91 U. S., p. 7. Taylor vs. Hutchinson, 25 Gratt. 536.

The relation of principal and agent, where the agency was created before the war, is not affected by the war, except that it is not lawful for the agent to transmit money to the principal during the war. His duty is to collect and preserve the fund. Neither is an insurance policy, made before the war, affected by the war, otherwise than to suspend it during the war. After the war it is the duty of the insured to tender payment of the unpaid premiums within a reasonable time, and his failure to do so then, will occasion a forfeiture of the policy. If the insured has died during the war it is not in-

cumbent on his personal representative to tender payment of the unpaid premiums. He need only give notice to the insurer, within a reasonable time, of the death of the insured, and he would be entitled to the amount of the policy from the insurer, less the amount of the unpaid premiums. *U. S. vs. Grossmayer*, 9 Wall 72. *Ins. Co. vs. Davis*, 95 U. S. 425. *Manhattan Life Ins. Co. vs. Warwick*, 20 Gratt. 614. *Hale vs. Wall*, 22 Gratt. 424. *Mutual Benefit Life Ins. Co. vs. Atwood's adm'x*, 24 Gratt. 497. *Conn. Mut. Life Ins. Co. vs. Duerson's Exr.*, 28 Gratt. 630.

PAGE 416—Sec. 265.—In modern times there seems to be no such distinction as is mentioned by Vattel between safe-conducts and passports. The only difference between them is as to the extent of travel allowed in each case, if there can even be said to be that difference. Some maintain that passports are general permissions granting the right of travel without restrictions in the territory belonging to the sovereign and under his control, and, being of this character, must be granted by the government; whilst safe conducts are special permissions, only granting the right of travel to a particular place for a definite object, and may be granted either by the government or by any particular naval or military officer, where the place is within his command. These passports must not be confounded with passports given in time of peace by a government to its citizens to facilitate their travel in foreign countries. *Davis' Int. Law*, p. 239. *Hall's Int. Law*, sec. 191.

PAGE 426—Sec. 295.—Sometimes in such cases as are mentioned in this section, the home government accords to their subjects belligerent rights. When it does this it puts itself

under obligation to treat them as enemies and not as rebellious subjects, during hostilities, and at the time asserts its intention to throw upon other nations the duties and rights of neutrality, and when it does this it must, in all respects, while the war lasts, treat them as enemies, and not as a part of their own country in rebellion against them. For instance, during the war between the Confederate States and the United States, after the United States had accorded belligerent rights to that portion of its people within the limits of the Confederate States, she proposed, instead of complying with the regular terms of war as to blockades, simply to declare certain Southern ports closed, upon the ground that a country had the right to say into which of its own ports foreign merchandize should come; upon which Lord John Russell wrote Lord Lyons that Her Majesty's government entirely concurs with the French government in the opinion that a decree closing the Southern ports would be entirely illegal, and would be an invasion of that recognized maxim of the law of nations, that the ports of a belligerent can only be closed by an effective blockade. U. S. State Papers, 1862, No. 1. Hall's Int. Law, sec. 5, and notes to that section.

PAGE 432—Sec. 10.—Since 1814, Sweden and Norway are, in some respects, combined together, and, in other respects, distinct states. They have one king but separate local governments. But in the respect mentioned in the text, there does not seem to be any change, except that when a question of war arises the king has to take the opinion of the joint council of the two kingdoms; but he is not legally bound by the opinion of this joint council, and may, after this, himself assume the full responsibility.

PAGE 436—Sec. 15.—The modern rule of neutrality, heretofore mentioned, will be remembered here as qualifying the text. Entire abstinence from any participation in the war, and entire impartiality of conduct towards both belligerents. See notes on sec. 104. Book III, *supra*.

PAGE 438—Sec. 21.—This is what is designated the principle of *uti possidetis*. By this it is understood that the simple conclusion of peace, without express stipulation accompanying it, vests in the two belligerents as absolute property whatever they have under their actual control, so far as territory and things attached to it are concerned, and, in the case of movable, whatever is in the legal possession of either at the time of the peace. See Hall's Int. Law, sec. 198.

PAGE 449—Sec. 47.—Reference is here made to note before given upon this question at section 202, Book II, page 215. There it was stated that the general rule is now believed to be that the violation of one material and important article of a treaty is a violation of the whole treaty and may be so regarded by the offended party.

PAGE 453—Sec. 60.—These cities and provinces spoken of here constitute what is known as the Swiss Confederation. The relations of these states are somewhat similar to those of the states now in the United States; under the articles of confederation and by their constitution the federal legislature, consisting of two branches, exercises the rights of sovereignty in the confederation in its dealings with foreign states.

PAGE 455—sec. 64.—It was under a mistaken view of the meaning of the author in this section, that the United States war-vessel *San Jacinto*, under the command of Capt. Wilkes, stopped and searched the British mail steamer, *The Trent*, on

her way from Havana to Nassau, and took from her Messrs. Mason and Slidell, Confederate diplomatic agents, on their way to the governments of France and Great Britain. It is not meant by Vattel that you can invade neutral territory, or arrest neutral ships on the high seas and "hinder" a nation "from sending ministers to solicit assistance," but he only means that a nation *has* the right to do this, by preventing their passage through its own territory, or by legitimate means, such as blockade, preventing the minister's exit from his own territory. This was the admitted interpretation of the text when the attention of the United States government was called to the question; but that government claimed the right to arrest them upon another ground which seemed to be equally fallacious. With the transport of contraband merchandize is classed, analogically, that of despatches bearing on the conduct of the war, carried from one part of a belligerent to another, and of persons in the service of the belligerent. It will be remembered that in the case of ordinary contraband trade, the contraband merchandize is confiscated, but the vessel usually suffers no further penalty than loss of time, freight and expenses. In the transport of despatches or belligerent persons, though, the despatches are, of course, seized, the persons become prisoners of war, and the ship is confiscated. This difference of treatment of the ship grows out of the fact that in such cases the ship is supposed to have entered into the active service of the belligerent. If the ship has not really entered into the service of the belligerent, but the despatches are carried in the ordinary way of trade, the only thing the vessel could do would be to take the despatches. If the vessel is a regular mail steamer, and they are sent in

the regular mail bags, there is a very serious question whether the vessel is liable to search for them at all. Whilst this point is not settled, there is certainly a tendency, in modern times, to concede immunity from search to the mail bags upon a declaration in writing being made by the agent of the neutral government on board, that no despatches are being carried for the enemy; but to permit a belligerent to examine the bags upon reasonable grounds of suspicion being specifically stated in writing; and, generally, it was agreed between the United States and Great Britain that where vessels carrying the mails were captured, the mails were to be forwarded unopened to their destination. No despatches, however, of the character mentioned, were found upon the Trent, and the whole question turned upon their right to arrest and treat as prisoners of war the captured persons before named. Mr. Seward, the Secretary of State for the United States, contended that these persons were liable to capture as contraband of war. He admitted, however, that even in this point of view, the commander of the vessel had not acted properly, for he should have brought the vessel in for adjudication; and, therefore, the men were released. Mr. Seward omitted to state what action the court of admiralty could have taken with regard to the men, if they had, with the vessel, been carried into port for adjudication. There are no provisions, by which a court of admiralty can entertain proceedings and render judgment against contraband men. And so, it seems, that the United States government would not have occupied any better position if the course recommended by Mr. Seward had been taken by the commander. The true doctrine seems to be that in such cases nothing can be done with the men unless the

vessel carrying them has so far entered into the service of the belligerent as to become really one of his vessels. In such case the men are liable to be made prisoners of war in the same way as they would be if found on board one of their own vessels. See, for a full discussion of this question, Phillimore's *Int'l Law*, vol. 2, sec. 130*a*. Dana's *Wheaton*, note 228 to sec. 504. Davis' *Int'l Law*, p. 361. Hall's *Int'l Law*, secs. 248—254. Bernard's *Neutrality*, p. 224. *Con. Globe*, part 1, *Sept.*, '61—2, pp. 241 to 246. Woolsey's *Int. Law*, sec. 199.

Another question arose in this connection during the Franco-Prussian war, and that was, what are the rights of the minister of a neutral country, as against a belligerent, who has succeeded in getting possession of the country belonging to the other belligerent, in whose country the minister of this neutral country is resident. It is certain that he is entitled to full inviolability, but do his privileges extend any further, and, if so, to what extent? During the siege of Paris the United States minister was refused leave to send a messenger, with a bag of despatches, to London, except upon the condition that the contents of the bag should be unsealed. Mr. Fisk, the Secretary of State for the United States, directed the United States minister at Berlin to protest against this act of the German government, arguing that, by the law of nations, the United States had a right to send, and to have, at the Court of France, a minister, and that this course would really deprive the United States of that right. The question was not settled, however, and, as a legal question, it is believed that the German government had strict right on its side, but, at the same time, it is thought that, as a matter of courtesy, the right claimed by the United States should be conceded, unless there

were some special reasons for its denial. See Hall's Int'l Law, sec. 101.

PAGE 456—Sec. 65—In ancient times ambassadors were only sent by one nation to another on special occasions, and their residence at foreign courts is a practice of modern growth. By some it is contended that the present practice was suggested by the conduct of the Pope in sending his legates to reside in different countries: by others the practice is attributed to Ferdinand, the Catholic, and by others to Louis XI, of France. Whatever may be its origin, it has now become fixed, and any attempt to break away from the usage or to deny the right would be regarded as indicating a want of comity if not of friendship. It is conceded, however, that a nation may, without offence, refuse to receive a minister from another, if the sovereignty of the nation sending the minister is doubtful, if the *particular individual* sent, is objectionable, or if he is sent on an errand inconsistent with the dignity or the interests of the nation to whom sent. Phillimore's Intl. Law, vol. 2, secs. 131, 139. Hall's Intl. Law, sec. 98. Wharton's Digest, vol. 1, sec. 83.

PAGE 460—Sec. 74.—According to the rules adopted in the Congress of Vienna in 1815, and in that of Aix La-Chapelle in 1818, on which the present practice almost everywhere is based, there are four classes of diplomatic agents,

1st. Ambassadors of temporal powers, legates and nuncios of the Pope.

2d. Diplomatic employes accredited to sovereigns, whether called envoys, ministers, ministers plenipotentiary and inter-nuncios.

3d. Resident ministers accredited to sovereigns.

4th. *Chargés d'affaires*, accredited to ministers of foreign affairs, and consuls invested with diplomatic functions.

Although in the United States all these terms are recognized yet, it seems, that we class the first and second together, and include, in one rank, ambassadors, envoys extraordinary and ministers plenipotentiary, and call them, indifferently, ministers. Phillimore's Intl. Law, vol. 2, secs. 214 to and including 222. Woolsey's Intl. Law, secs. 86-89. Revised Stats. U. S., sec. 1675.

PAGE 461—Sec. 76.—A minister, now, to enable him to be received in that character, is provided by his chief executive with two important papers, called his Letters of Credence and Full Power, which correspond with what are called here by Vattel his credentials and instructions. An ambassador or minister accredited to a sovereign, upon his arrival, forwards a copy of his Letters of Credence to the minister of Foreign Affairs and requests an audience with the sovereign. At this audience, which may be either in private or public, he presents his Letters of Credence and complimentary speeches are usually exchanged. He may then enter upon the performance of his duties. Davis' Intl. Law, p. 146.

PAGE 467—Sec. 85.—This explains what was meant in sec. 64 of this book. See that note.

PAGE 470—Sec. 91.—According to modern practice this duty is performed by any one sent under a flag of truce, which is a white flag, instead of by the drummer and trumpeter mentioned here.

PAGE 474—Sec. 96.—The mission of a diplomatic agent, it is stated, is terminated in the following ways:

1. By his recall.

2. By his departure on his own account upon a cause of complaint stated.
3. By his dismissal by the government to which he is accredited.
4. By war or the interruption of amicable relations between the country to which he is accredited and his own.
5. By the expiration of his letter of credence, if for a specific time.
6. By the fulfillment of the specific object of his mission.
7. In case of monarchical countries, by death of sovereign by whom sent.

In modern times it is not usual to dismiss a diplomatic agent, but simply to request or require his own nation to recall him, giving the reasons why he should be recalled, and it is the right of his state to decide whether these reasons are sufficient for his recall. The reasons, generally, are offensive conduct towards the government to which he is accredited or interference in the internal affairs of the State. The exercise of the right to require the recall has been used by the United States several times. In 1804, the recall of the minister of Spain was demanded for attempting to bribe a newspaper with reference to a matter at issue between the two countries, and for other improper conduct. In 1809, the recall of Jackson, the British minister at Washington, was demanded for giving offensive toasts at public dinners and for, in effect, charging the United States administration with falsehood and duplicity. In 1871 the recall of the Russian minister was demanded. In only one case has the United States dismissed the diplomatic agent. In 1888, Lord Sackville was dismissed for intermeddling in the Presidential election and, afterwards,

using insulting language in his account of it to a newspaper reporter. When the functions of an ambassador cease for any cause his departure is ordinarily attended by formalities somewhat similar to those used at his reception, *mutatis mutandis*. Hall's Intl. Law, sec. 98. * * Davis' Intl. Law, pp. 148, 149.

PAGE 480—Sec. 101.—A few years after this opinion in the case of Leslie Bishop, of Ross, a contrary opinion was given, by persons better informed, in the case of Mendoza, the Spanish minister in England, who had plotted to bring in foreign soldiers and dethrone Elizabeth. In that case it was decided that an ambassador, who had even been concerned in a conspiracy, could not be put to death, but must be remanded to his prince for punishment. A similar decision was made in the reign of James I, on charges made against the Spanish ambassadors. In that case Sir Robert Cotton, being consulted whether any proceedings could be instituted against them, maintained that an ambassador as representing the person of a sovereign is "exempt from regal trial; that all actions of one so qualified are made the act of his master until he disavow them; and that the injuries of one absolute prince to another are *factum hostilitatis*, not treason." He said, of this case of the Bishop of Ross, that it had formed the text of all future discussions upon the subject of the inviolability of ambassadors, and that the opinion of Elizabeth's civilians had been deservedly and generally rejected by the authority of the best writers as well as by the practice of the most civilized States. The general doctrine now is, that the only circumstances which would warrant the sovereign, to whom an ambassador is accredited, to undertake his punishment himself,

would be such as made it necessary for him to act in the paramount right of self-preservation and self-defense. And this immunity from criminal jurisdiction not only applies to himself, but to his family and retinue, his chaplain, physician, private secretary, secretary of legation and domestic servants. Phillimore's Intl. Law, vol. 2, secs. 159, 160 and 163. Wheaton's Intl. Law, sec. 225. Woolsey's Intl. Law, sec. 91.

PAGE 483—Sec. 104.—This religion, when not practiced in the country where he resides, must be strictly house worship, and without any external sign to indicate to passers by that it is a place of worship, and he cannot, without permission from the government, permit its subjects to take part in the services. The chaplain must not appear abroad in his canonicals. This whole question, however, when necessary, is a matter of permission and comity. Phillimore's Intl. Law, vol. 2, secs. 209, 210. Wheaton's Intl. Law, sec. 248. Woolsey's Intl. Law, sec. 94.

PAGE 484—Sec. 105.—This matter of exemption from imports and taxes depends very much upon the regulations adopted by each country: but, ordinarily, his personal effects are exempt from taxation, and the property belonging to him as representative of his sovereign, and duties are, generally, remitted on articles from abroad which he needs for the use of himself and his family. The United States Treasury regulations on this subject are as follows: "All applications to this department for free entry of articles imported for the use of ministers and *chargés*, and which they desire shall be delivered free of duty, must be made through the Department of State, accompanied by a bill of lading and a statement of the number of packages and their marks and numbers with a general

description of their contents, naming the vessel or other vehicle in which the same were imported, and the person to whom they wish the delivery to be made. Then there will be instructions given to the collector to deliver them free of duty." Woolsey's Intl. Law, sec. 93. Phillimore's Intl. Law, vol. 2, sec. 203. Hall's Intl. Law, sec. 53. Wharton's Dig., sec. 95.

This immunity from taxation is never extended to the following classes of property:

- 1st. Real property.
- 2d. Personalty unconnected with the ambassadorial character and this immunity is granted,
- 3d. Seldom, if ever, to tolls and postages.

PAGE 485—Sec. 108.—This same privilege is also extended to the following classes of persons: to ambassadors, their suite, family and servants, and to the officers and crews of public armed vessels in foreign ports, and armies in their permitted transit through foreign territory. Woolsey's Intl. Law, sec. 68.

PAGE 492—Sec. 114.—In order to prevent any difficulty on this point the modern law discountenances the trading of ministers. Wheaton's Intl. Law, note 128 to section 226.

It is said, in text, that when we say that we may seize such of the ministers effects as have no relation to his public character, particularly those that belong to his commercial concerns, this is to be understood only on the supposition that the seizure be not made for any cause arising in his transactions in quality of minister, as, for instance, articles supplied for the use of his family, house rent, etc. A question of this character arose some years ago between the governments of the United States and Prussia. The Prussian Code provided that

the landlord had a right of lien for his rent and damages done the property, upon the goods brought by the tenant upon the premises, and which remained there at the expiration of the lease. Under this law the proprietor of the house, in which the United States minister resided, claimed the right to detain the goods of the minister on the premises at the expiration of the lease, to answer damages alleged to be due on account of injuries done the house. This claim was resisted by the minister on the ground, that, by the law of nations, his personal property, not used in trade, was exempt from seizure. After much discussion the controversy was terminated by the parties, by the proprietor of the house restoring the effects and the minister paying a reasonable compensation for the damage done. The question, however, was submitted to the United States for answer, and the answer was that the property could not be detained on account of any law of the country, but might be retained if the minister gave an express lien on the property. It seems that the reason of the principle would apply as well to an express lien as to one provided for by the laws of the country. See for full discussion of this case, Wheaton's Intl. Law, secs. 228 to 242.

PAGE 493—Sec. 115.—The property not exempt is, 1st, Immovables, except the actual dwelling house of the ambassador, whilst in use by him; 2nd, Property embarked by him in trade, and 3rd, Property held by him as trustee or executor.

PAGE 493—Sec. 116.—The only question in such case, says Sir Robert Phillimore, is in the proper way of serving notice on the ambassador. It has been said that, technically speaking, notice ought to be served upon his domicile; *i. e.* his residence in his own country; but Bynkershoek justly ob-

serves that a letter is at once the most courteous and effectual way of apprising him of his interest in the legal proceedings. We see no reason why he should not be proceeded against in the mode prescribed for proceeding against absent defendants. It is submitted that the same reasons might be urged against the minister's being brought into court with regard to his realty and property, used in trade, as in regard to his other property. We presume jurisdiction is given, with regard to realty and property used in trade, upon the hypothesis that his government, by consenting to his engaging in trade, agrees to take the risk of litigation, in this respect, interfering with his duties as minister. As before stated, to remove all difficulty on this point, the modern practice, practically, prohibits diplomatic agents from engaging in trade. In addition to this jurisdiction, there is also a kind of defensive jurisdiction which may be exercised over ambassadors to prevent them from doing some civil injury, by way of injunction.

PAGE 494—Sec. 118.—This shows that the doctrine of extritoriality, in regard to the minister's house, is a mere fiction and that the house is regarded as out of the territory only so far as the minister, his family and retinue are concerned, and the tendency in modern times is only to exempt his house from territorial jurisdiction, when the exercise of it would interfere with the free exercise of his functions.

PAGE 499—Sec. 124.—It will be seen here that the fiction of extritoriality is only an invention to explain certain immunities and exemptions from the local law, a fiction which is, sometimes, extended to persons other than ministers. Davis' Int'l Law, p. 59. Woolsey's Int'l Law, sec. 68.

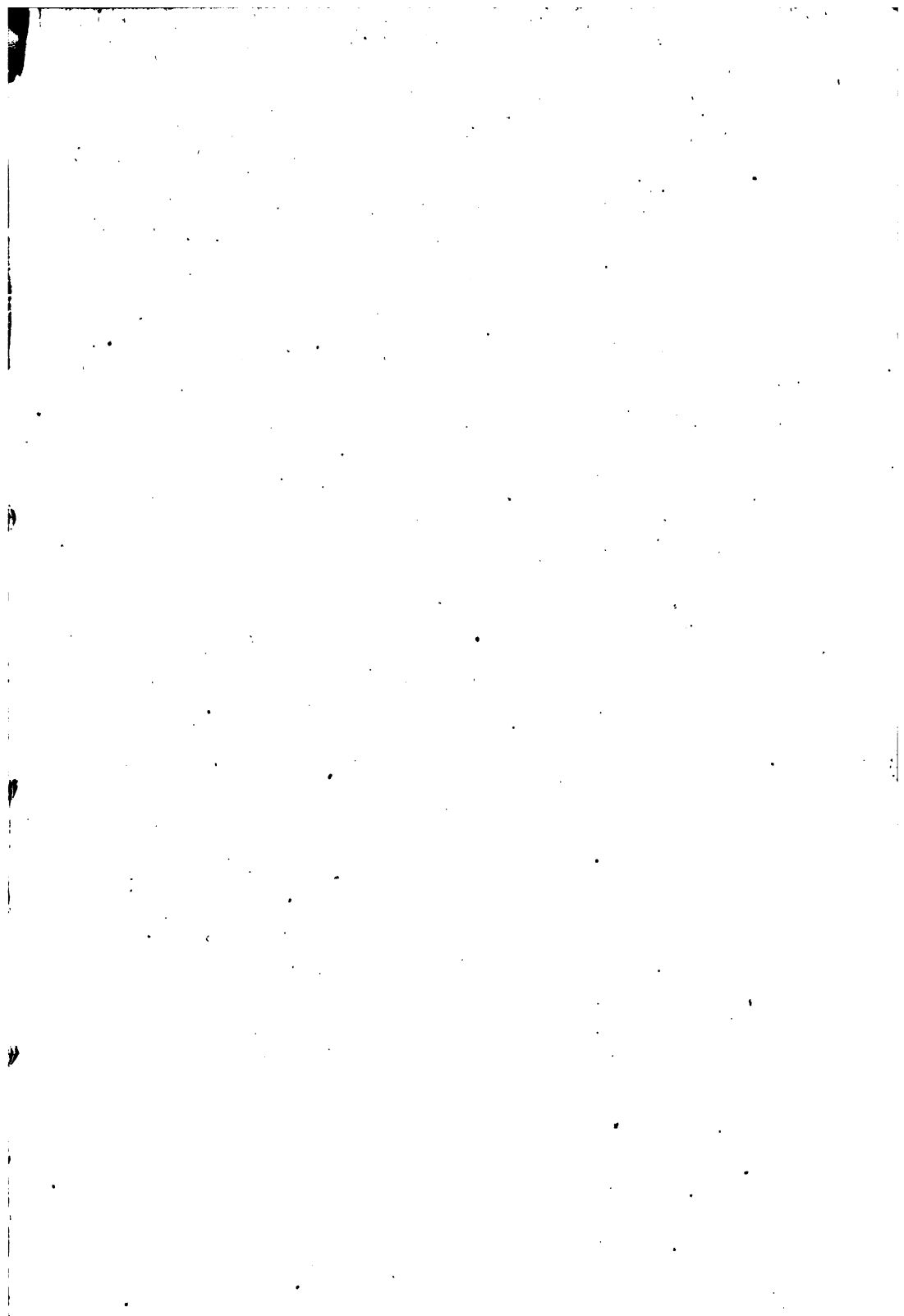
Another question has been raised as to how you may pro-

cure, if at all, the attendance of a diplomatic agent, or that of a member of his family or suite, as a witness in a cause where they are needed. It seems to be conceded that, in such cases the government has no power to compel their attendance as witnesses. In 1856, a homicide having been committed in Washington in the presence of the Dutch minister, he was requested to appear and give evidence. He refused to appear in person, but proposed to give a deposition in writing, if his government would consent. His government sustained him in this position, but as it is customary in such cases for the minister, when wanted, to attend and submit to the examination, his government was required to recall him. In cases where a deposition will answer the purpose, it is customary for the minister of foreign affairs to apply to the diplomatic agent for it and it is generally given.

His jurisdiction over his train in modern times only extends to subordinate measures. He can either send his follower home or turn him over to the authorities of the country for trial. In case he sends him home he gathers and prepares the evidence. He has no right to try them for offences himself. Woolsey's Int'l Law, sec. 95. Wheaton's Int'l Law, sec. 226, note 128 (Dana's note). Hall's Int'l Law, sec. 53.

✓
254

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